In the
Supreme Court of the United States.

OCTOBER TERM, 1978.

No. 78-1076.

STATE OF RHODE ISLAND,
PETITIONER,

v.

THOMAS J. INNIS,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF RHODE ISLAND.

Brief of the Respondent.

WILLIAM F. REILLY,
Public Defender,
JOHN A. MACFADYEN, III,
Assistant Public Defender,
Appellate Division,
Office of the Public Defender,
250 Benefit Street,
Providence, Rhode Island 02903.

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS.

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Brief of the Respondent.

Opinion Below.

The opinion of the Supreme Court of Rhode Island is reported at 391 A. 2d 1158 (1978).

Jurisdiction.

The respondent agrees with the statement of jurisdiction as it appears in the brief for the petitioner.

Question Presented.

Whether the Supreme Court of Rhode Island correctly applied proper federal constitutional standards to an incomplete and ambiguous record when it concluded that the admissions of the respondent, his conduct in leading the police to an item of contraband and the contraband itself should be excluded from evidence.

Constitutional Provisions Involved.

The respondent agrees with the denotation of constitutional provisions appearing in the brief for the petitioner (the Fifth and Fourteenth Amendments to the Constitution of the United States).

Statement of the Case.

Prior Proceedings.

On March 20, 1975, a grand jury returned indictment No. 75-8 against Thomas J. Innis (hereinafter the respondent) charging him with the crimes of kidnapping, robbery, and

murder. Trial upon the indictment began on October 31, 1975. Before the impanelling of the jury, the respondent made several oral motions to the trial court (App. 3-4). One of these motions was the subject of an in-chambers conference. This motion urged the suppression of evidence arising out of the seizure of a shotgun that was found with the aid of the respondent (App. 4). The trial judge and counsel agreed to conduct the suppression hearing at the appropriate time during the trial (App. 5).

On November 7, 1975, the jury was sent out of the courtroom and a voir dire was conducted on the respondent's motion to suppress (App. 8). At the conclusion of the voir dire, the trial judge denied the respondent's motion (App. 11-61, 63). The respondent's exception was noted (App. 63). The State then proceeded to introduce evidence describing the circumstances surrounding the seizure of the shotgun through the testimony of two police officers, Lovell and Gleckman (App. 64-73).

On November 12, 1975, Thomas J. Innis was found guilty of kidnapping, robbery, and murder in the first degree, in violation of R.I. G.L. (1969 Reenactment) §§ 11-26-1, 11-39-1, 11-23-1, respectively. On November 25, 1975, he was sentenced to life imprisonment on the murder, to thirty years on the robbery and to twenty years on the kidnapping. These sentences were to run concurrently with a sixteen-year sentence on unrelated charges which the respondent had begun serving in January of 1975 (App. 75-76).

On appeal the respondent raised seven issues. Five of these issues were not reached by the court, including both a claim that the respondent's right to counsel under the Sixth Amendment to the United States Constitution had been effectively denied and a claim that the motion to suppress should have been granted under R.I. Const. Art. 1, § 13. Instead, relying primarily on the Fifth Amendment to the United States Con-

stitution, this Court's holding in *Miranda* v. *Arizona*, 384 U.S. 436 (1966), and a number of Rhode Island decisions construing *Miranda*, the court concluded that Officer Gleckman had impermissibly attempted to elicit incriminating information from the respondent immediately after Mr. Innis had invoked his right to counsel, that the respondent's inculpatory response was the product of "subtle compulsion," and that discovery of the shotgun was the direct product of these illegal endeavors. The court held that the shotgun and the statements leading to its discovery were improperly admitted. It sustained the respondent's appeal on this ground and remanded the case for a new trial.[1] *State of Rhode Island* v. *Thomas J. Innis*, ____ R.I. ____, 391 A. 2d 1158 (1978).

On November 16, 1978, the State filed a motion for reargument out of time in the Rhode Island Supreme Court. The respondent cross-petitioned for reargument, requesting that the court reach the issues that were unresolved by the court's original decision. On December 21, 1978, the Rhode Island Supreme Court denied the motions for reargument out of time.

The State then filed a petition for a writ of certiorari to this court, which was granted on February 26, 1979. *Rhode Island* v. *Innis*, ____ U.S. ____ (1979).

Statement of Facts.

At approximately 4:30 A.M. on January 17, 1975, the respondent, Thomas Innis, was arrested at gunpoint by Officer Lovell of the Providence police (App. 11; R. 452). In rapid succession the respondent was handcuffed, searched, advised

[1] The Supreme Court of Rhode Island also ruled that a defendant may not be convicted both of first degree felony murder and of the underlying felony. The State does not seek review of this holding.

of his constitutional rights, and placed in a patrol car (App. 13, 17). Within minutes, approximately twelve other officers were on the scene, one of whom, Sergeant Sears, again advised the respondent of his constitutional rights while seated beside him in the rear of the car (App. 29, 31). When Captain Leyden arrived the respondent was outside the vehicle, being held by Officer Lovell and Sergeant Sears, and surrounded by a total of four officers (App. 37, 49). Captain Leyden advised him of his constitutional rights, and the respondent stated that he wanted an attorney (App. 35). Officers Gleckman, McKenna, and Williams all heard the respondent make this request (App. 42, 50, 58). Captain Leyden then directed that the respondent be placed in the "caged wagon,"[2] and that he be taken to the central station (App. 35). He was placed in the vehicle and the doors were closed (App. 55). Captain Leyden ordered a third person, Officer Gleckman, to accompany Officers Williams and McKenna, who were assigned to the wagon (App. 55-56). Captain Leyden further directed that the officers were not to question the respondent or intimidate or coerce him in any way (App. 46). The three officers then entered the vehicle, and it departed.

The wagon proceeded in a westerly direction, going "out" of the city (App. 45, 52, 60). It traveled approximately a mile, the trip encompassing from three to five minutes (App. 45, 52, 59; R. 452). During this period, Officer Gleckman initiated a conversation with his fellow officers[3]:

> A. At this point, I was talking back and forth with Patrolman McKenna stating that I frequent this area while

[2] A "caged wagon" is a four-door sedan, distinctive only in that it has a wire mesh screen between the front and rear seats (App. 46, 51).

[3] While there is conflicting testimony about the exact seating arrangements in the vehicle, it is abundantly clear that all the passengers heard what transpired (App. 46, 50, 52).

> on patrol and there's a lot of handicapped children running around this area, and God forbid one of them might find a weapon with shells and they might hurt themselves. (App. 43-44.)

Officer McKenna apparently shared his brother officer's apprehension:

> A. I more or less concurred with him [Gleckman] that it was a safety factor and that we should, you know, continue to search for the weapon and try to find it. (App. 53.)

While Officer Williams said nothing, he recalled with specificity certain details of the conversation

> A. He [Gleckman] said it would be too bad if the little — I believe he said a girl — would pick up the gun, maybe kill herself. (App. 59.)

As the conversation proceeded, the respondent interrupted, exclaiming that he would show them where the gun was located (App. 58). Officer McKenna immediately radioed back to Captain Leyden that they were returning to the scene and that the respondent would show them where the gun was (App. 44, 50, 59).

At the scene the officers reiterated that the respondent "wanted to show them where the gun was because he didn't want anybody — any kids up there to get hurt" (App. 22). The respondent was again advised of his constitutional rights, to which he responded that "[h]e wanted to get the gun out of the way because of the kids in the area in the school" (App. 39).

The respondent was then placed back in the wagon which then led a parade of police cars up the hill to where Mr. Innis

had indicated the shotgun would be found (App. 23, 39). The respondent, still handcuffed and being held by Officer Gleckman, began searching for the weapon (App. 72). Captain Leyden ordered the numerous officers still present to position their vehicles so that the headlights could illuminate the area in which the respondent was searching (App. 39-40, 72). After a false start, the respondent located the weapon (App. 45).

Summary of Argument.

This case presents the issue of the admissibility in the State's case-in-chief of police testimony recounting certain incriminating statements made by the respondent while in police custody. This testimony also described an incriminating course of conduct as the respondent led the police to an item of contraband. Only secondarily does it involve the issue of the admissibility of that contraband.

The fundamental dispute between the parties is primarily factual, not legal, in nature. The petitioner objects, not so much to the standards employed by the Supreme Court of Rhode Island, but to the conclusions reached after an application of these standards to an incomplete and ambiguous record. The respondent had been given the warnings required by *Miranda* v. *Arizona*, 384 U.S. 436 (1966), and he had requested to see an attorney. Immediately thereafter he was subjected to comments which the Supreme Court of Rhode Island found to be "subtly compelling." The court held that this was "not a case where a defendant voluntarily confesses to a crime or admits to incriminating evidence on his own." *State* v. *Innis*, ____ R.I. ____, 391 A. 2d 1158, 1163 (1978). It then concluded that the officers' remarks were tantamount to interrogation, and, eschewing an application of *Miranda's per se* rule of exclusion, it found that the record did not show that the

respondent had waived his previously invoked protections. In regard to the tangible evidence located under the direction of the respondent, the court found that it should have been suppressed as a product of the compelling remarks or alternatively as a fruit of the prior illegality.

The respondent argues that the evocative comments of the Providence police immediately following his request for counsel constituted interrogation within the meaning of *Miranda*. Interrogation cannot be limited to sentences which end with questions marks. *Miranda* was intended to counterbalance any inducement to confess offered by the police to a suspect in custody, when that inducement augments the pressures already inherent in the custodial setting. The nature and form of any additional inducement or pressure should be irrelevant to the operation of *Miranda*, so long as it is in fact likely to elicit an incriminating response. The petitioner does not quarrel with this flexible and ultimately objective approach, but instead argues that the conclusion of the Supreme Court of Rhode Island that Innis was subtly compelled and therefore interrogated finds no support in the trial record. The respondent suggests that this issue is primarily one for state court resolution and that the record fully supports the conclusion reached by the court below.

The respondent asserts that the conduct of the police in the present case violated the *Miranda* mandate in two respects: first, that the arresting officers did not scrupulously honor the respondent's invocation of his right to counsel, and, second, that they induced incriminating responses without first gaining a voluntary waiver of his constitutional protections. Even if the comments of the police did not meet a technical definition of interrogation, the respondent argues that the police did not honor his exercise of the right to counsel where they made him privy to remarks likely to induce an inculpatory response immediately on the heels of his invocation of that right. The

fact that the respondent was again warned of his constitutional protections after the officers had already gained an incriminating agreement to lead them to the tangible evidence could not, and did not, cure the initial violation of the *Miranda* rule. The testimony describing his immediately ensuing conduct is therefore inadmissible.

The respondent also argues that the Supreme Court of Rhode Island was clearly correct in concluding that no waiver occurred when the respondent first agreed to lead the officers to the shotgun. Nor does the record support a finding of waiver when, several minutes later, the respondent was rewarned and he consummated his previous agreement. The cat was out of the bag, and the respondent's custodial circumstances had not materially changed. Having once under pressure both admitted his knowledge of the shotgun and agreed to lead the police to it, he could not, only minutes later, before the same officers, disavow his willingness to divulge the secret of its location.

The respondent suggests that the shotgun was only the end product of a sequence of inculpatory events. Not only should the respondent's statements and the testimony of his actions have been suppressed at trial, but the shotgun itself should have been excluded as a violation either of *Miranda's per se* rule or of its waiver requirements. It should be noted, however, that it is the evidence linking the respondent to the shotgun and not the shotgun itself that is really at issue here. If the Supreme Court of Rhode Island was correct in excluding the testimony of the police officers, this Court need not even reach the question whether the shotgun itself should have been suppressed.

Assuming, however, that the shotgun should be treated separately from the other evidence admitted against the respondent, part II of the respondent's brief argues that the Supreme Court of Rhode Island was correct in applying a fruits analysis,

given the peculiar circumstances of this case. The court found that the respondent had been subjected to "subtle compulsion" and that he had not voluntarily offered to lead the police to the weapon. Where this compulsion served to negate the respondent's exercise of the crucial protections afforded by counsel, his privilege against compelled self-incrimination was violated, and not merely his rights under the prophylactic rules mandated by *Miranda*. The Fifth Amendment and the deterrent purposes of the fruits exclusionary rule developed in the Fourth Amendment area require suppression of the tangible evidence seized in the present case.

In the alternative, even if the police conduct did not violate the privilege itself, application of the fruits doctrine is appropriate given the factual context of this case and the nature of the *Miranda* violation which produced the tangible evidence. In sharp contrast to *Michigan* v. *Tucker*, 417 U.S. 433 (1974), this case is not one where the police acted in complete good faith. While the officer in charge of the investigation complied with the *Miranda* mandate that interrogation must cease upon a request for counsel, his subordinates, in blatant contravention of both his orders and the law, utilized a psychological ploy to induce an inculpatory response only minutes after the respondent had invoked his right to counsel. Nor was the shotgun an unanticipated fruit of a general police search for information; from the first, it was the precise objective of their endeavors. The deterrence rationale of the fruits cases is thus peculiarly appropriate in the present case. Without reaching the broad question whether the tangible fruits of all *Miranda* violations occurring after the date of the *Miranda* decision should be suppressed, this Court should hold that the shotgun was properly suppressed as a fruit of the poisonous tree.

Argument.

I. The Supreme Court of Rhode Island was Correct in Concluding that the Evidence Relating to the Finding of the Shotgun was Obtained in Violation of the Holding in Miranda v. Arizona, 384 U.S. 436 (1966), and in Violation of the Fifth Amendment to the Constitution of the United States.

The Fifth Amendment to the Constitution of the United States provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself . . .." In *Malloy* v. *Hogan*, 378 U.S. 1 (1964), this Court held the privilege against compelled self-incrimination applicable to state prosecutions, thereby insuring the right of every person accused of crime "to remain silent unless he chooses to speak in the unfettered exercise of his own will . . .." *Id.* at 8. Two years later, *Miranda* v. *Arizona*, 384 U.S. 436 (1966), explicitly extended the privilege to persons in police custody but not yet formally charged with a crime.[4] This extension followed much earlier applications of the privilege to activities outside the formal criminal judicial process. *See, e.g.*, *Emspak* v. *United States*, 349 U.S. 190 (1955) (privilege held applicable to legislative proceedings); *McCarthy* v. *Arndstein*, 266 U.S. 34 (1924) (privilege held applicable to civil proceedings); *ICC* v. *Brimson*, 154 U.S. 447 (1894) (privilege held applicable to administrative investigations); *Counselman* v. *Hitchcock*, 142 U.S.

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[4]Some seventy years earlier, in *Bram* v. *United States*, 168 U.S. 532 (1897), this Court had suggested that the voluntariness of confessions in federal prosecutions should be analyzed under the Fifth Amendment. *See also*, *Shotwell Mfg. Co.* v. *United States*, 371 U.S. 341 (1963); *Wan* v. *United States*, 266 U.S. 1 (1924); *Hardy* v. *United States*, 186 U.S. 224 (1902). *Bram* was obscured, however, by an onslaught of state confession cases which, in the absence of an incorporation doctrine, could only be treated under the Fourteenth Amendment due process clause.

547 (1892) (privilege held applicable to grand jury proceedings). In all of these proceedings, the precise nature of the compulsion was clear; the only issue was the individual's right to refuse to answer.

Stationhouse interrogation, however, posed the contrary problem: The arrestee's right to resist self-incrimination was clear, but the nature and extent of the compulsion, if any, not only varied with each case but was also shielded from judicial ascertainment by the closed door of the interrogation room. *Miranda* thus dealt with a unique threat to the privilege, and, not surprisingly, its solution departed from the traditional method of case-by-case adjudication which had produced more than thirty due process voluntariness cases and an increasing difference in opinion amongst members of the Court as to what police practices so offended the community's sense of fair play as to violate the due process clause. *Compare* the majority and dissenting opinions in *Culombe* v. *Connecticut*, 367 U.S. 568 (1961), and *Haynes* v. *Washington*, 373 U.S. 503 (1963).[5]

[5]Due process voluntariness had its genesis in the common-law distrust of the reliability of confessions extracted through physical torture. *Brown* v. *Mississippi*, 297 U.S. 278 (1936). Through the years, however, the Court's focus changed from the reliability of the evidence obtained to whether the interrogation had deprived the defendant of his "free choice to admit, to deny, or to refuse to answer." *Lisenba* v. *California*, 314 U.S. 219, 241 (1941). Psychological coercion was included within the ambit of the Court's disapproval, despite the absence of any indication that the confessions lacked considerable probative value. *See, e.g., Leyra* v. *Denno*, 347 U.S. 556 (1954); *Watts* v. *Indiana*, 338 U.S. 49 (1949); *Chambers* v. *Florida*, 309 U.S. 227 (1940). Where the accused had been "subjected to pressures to which, under our accusatorial system, an accused should not be subjected," the admission of even a clearly trustworthy confession would require reversal of the conviction. *Rogers* v. *Richmond*, 365 U.S. 534, 541 (1961). By the 1950's the surface simplicity of the voluntariness test had broken to reveal a complex matrix of variables concerning the behavior of the police and the subjective attributes of the suspect. In *Culombe* v. *Connecticut*, *supra*, Mr. Justice Frankfurter filed 67 pages in an attempt to explain why Culombe's confession was involuntary, only to generate a concurrence by two justices and a dissent by three others. Five years later, in *Davis* v. *North Carolina*, 384 U.S. 737 (1966), a uniquely clear record establishing a sixteen-day detention in a purposefully incommunicado setting failed to impress four lower courts before this Court reversed. As Professor Stone has noted, given "the Court's inability to articulate a clear and predictable definition of 'voluntariness,' the apparent persistence of state courts in utilizing the ambiguity of the concept to validate confessions of doubtful constitutionality, and the resultant burden on its own workload, it seemed inevitable that the Court would seek 'some automatic device by which the potential evils of incommunicado interrogation [could] be controlled.'" Stone, *The Miranda Doctrine in the Burger Court*, 1977 Sup. Ct. Rev. 99, 102-103 (1978) (notes omitted).

Miranda begins with a recognition of the myriad ways in which the police may bring pressure to bear upon a suspect once he is taken into custody. *Miranda* v. *Arizona*, *supra*, at 449-456. Chief Justice Warren stressed that "the modern practice of in-custody interrogation is psychologically rather than physically oriented." *Id.* at 448. No particular interrogation technique was singled out for condemnation, as this Court recognized that techniques could and would vary with each interrogation, with each suspect, and with each opinion rendered by the Court which limited the prerogatives of the police. Instead, *Miranda* sought to identify the characteristics common to these techniques and to provide safeguards when these characteristics were evident.

The Court focused on two key attributes of stationhouse interrogation: first, the fact of custody; and second, the fact of a deliberate attempt to elicit information backed up by the apparent authority of the police. Incommunicado custody "carries its own badge of intimidation." *Id.* at 457. The atmosphere itself generates "[t]he potentiality for compulsion . . .." *Id.* at 457. In this context, when an agent of the state, acting in an obviously official capacity, seeks to obtain incriminating evidence, the threat to the privilege is greatly intensified.

> Even without employing brutality, the "third degree" or the specific strategems described above, the very fact of custodial interrogation exacts a heavy toll on individual liberty and trades on the weakness of individuals.

Id. at 455 (notes omitted). This Court did not hold that the compulsion produced by arrest and detention is sufficient to require the observance of countervailing safeguards; nor did it outlaw all custodial interrogation. *Miranda* held only that where the police have a suspect in custody and then proceed to prod or persuade him to incriminate himself, the threat to the privilege is constitutionally intolerable unless certain safeguards are observed.

> Unless adequate protective devices are employed to dispel the compulsion inherent in custodial surroundings, no statement obtained from the defendant can truly be the product of his free choice.
>
> . . . . . .
>
> An individual swept from familiar surroundings into police custody, surrounded by antagonistic forces, and subjected to the techniques of persuasion described above cannot be otherwise than under compulsion to speak. As a practical matter, the compulsion to speak in the isolated setting of the police station may well be greater than in courts or other official investigations, where there are often impartial observers to guard against intimidation or trickery.

Id. at 458, 461 (notes omitted). Thus, *Miranda* requires a sympathetic interaction of custody and some *further* official pressure to incriminate oneself before its safeguards become

applicable.[6] Where a suspect is not in fact in custody, the threat to the privilege is sufficiently diminished so as not to demand any particular police procedures. *Oregon* v. *Mathiason*, 429 U.S. 492 (1977); *Beckwith* v. *United States*, 425 U.S. 341 (1976). Conversely, where no additional pressure is put on a suspect in custody and he simply volunteers incriminating information, it will be fully admissible in evidence. *Miranda* v. *Arizona*, *supra*, at 478. Mr. Innis' case falls into neither of these two categories.

A. *The Respondent was Interrogated Within the Meaning of Miranda v. Arizona, supra, While in the Custody of the Police.*

Thomas Innis was arrested at gunpoint at approximately 4:30 A.M. on January 17, 1975 (App. 11; R. 452). He was immediately handcuffed (App. 17), and within minutes he was surrounded by three or four additional policemen (App. 37),

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[6] Professor Kamisar has summarized the *Miranda* foundation as follows:

> It is this combination of "custody" and "interrogation" that creates — and, in the absence of "adequate protective devices," enables the police to exploit — an "interrogation environment" designed to "subjugate the individual to the will of his examiner." It is this *combination* — more awesome, because of the interplay, than the mere sum of the "custody" and "interrogation" components — that produces the "interrogation atmosphere," "*interrogation* . . . in a *police dominated* atmosphere," that "carries its own badge of intimidation," that "exacts a heavy toll in individual liberty and trades on the weakness of individuals," and that is so "at odds" with the privilege against compelled self-incrimination.

Kamisar, *Brewer* v. *Williams, Massiah, and Miranda: What is Interrogation? When Does it Matter?*, 67 Geo. L. J. 1, 63 (1978) (emphasis original). The respondent is deeply indebted to this illuminating article for much of the content of this section of his brief.

two of whom were holding him by the arms (App. 49); an additional twelve policemen were close by (App. 37). After thrice being given the warnings required by *Miranda* (App. 12-14, 19, 20-21), he requested to see an attorney (App. 35). He was then "placed" in a caged wagon with three police officers (App. 35), who were instructed by their superior not to interrogate or to coerce Mr. Innis in any way during their trip to the stationhouse (App. 46). There is no indication in the record that the respondent could hear these instructions. Shortly thereafter, in response to a number of remarks made by the officers in the wagon, Mr. Innis made a highly incriminating statement.

The petitioner does not suggest that the respondent was not in custody within the meaning of *Miranda* (Petitioner's Brief at 24). It argues instead that this admittedly custodial setting was not coercive (Petitioner's Brief at 24-25). This argument finds no support in the record. The respondent had been abruptly seized in the middle of the night by a number of police officers. His request for counsel had resulted not in an assurance that he could see a lawyer, but in an order to take him to the central station to await the arrival of a member of the police force.

Mr. Justice Powell has termed the back seat of a police vehicle "an inherently coercive setting" which is "conducive to . . . psychological coercion . . .." *Brewer* v. *Williams*, 430 U.S. 387, 413 n.2, 412 (1977) (Powell, J., concurring). The Sixth Circuit Court of Appeals has carefully described the profoundly threatening experience of being taken for a "ride" by the police.

> The prisoner and police officers are in close contact within a confined area. Often, the inside door handles are removed and the front and back seats are separated by wire mesh or a plastic divider. Invariably, the prisoner is handcuffed. He is effectively cut off from the world outside the patrol car. As a practical matter, he has no access to friends or counsel. If the prisoner has just been arrested, he may still be disoriented and apprehensive in an often hostile and alien setting. In short, the back seat of a patrol car as the setting for a confession conforms in all respect[s] to the "incommunicado, policedominated" atmosphere which led the Supreme Court in *Miranda* v. *Arizona*, 384 U.S. 436, 456, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), to recognize the need for special procedures to minimize the inherent coerciveness of custodial interrogation.

United States v. *Brown*, 557 F. 2d 541, 551 (6th Cir. 1977). The petitioner's assertion that the setting was noncoercive cannot be reconciled with the record.

The state's primary argument claims that the remarks of the officers in the squad car were simply off-hand conversation, not intended for the suspect's ears and unlikely to elicit an incriminating response (Petitioner's Brief at 24-25). Officer Gleckman testified that while he did not say anything to the respondent directly or ask him any questions (App. 44), he did initiate a discussion with one of his brother officers regarding the risk to local school children created by the presence of a shotgun.

> I was talking back and forth with Patrolman McKenna stating that I frequent this area while on patrol and there's a lot of handicapped children running around in this area, and God forbid one of them might find a weapon with shells and they might hurt themselves. (App. 43-44.)

Officer McKenna responded by agreeing that a school for the handicapped was in the neighborhood and by noting the critical need to find the shotgun (App. 47, 53). The respondent could clearly hear this entire conversation (App. 46). Officer Williams essentially corroborated this testimony, adding details of the evocative exchange carried on in the front seat.

> He said it would be too bad if the little — I believe he said girl — would pick up the gun, maybe kill herself. (App. 59.)

It is interesting to note the officer's choice of sex to flesh out this scenario. At some point during the officers' conversation, the defendant broke in, saying, "Stop, turn around, I'll show you where it is" (App. 44).

In determining whether this interchange operated as an inducement to speak and consequently as "interrogation" requiring the observance of *Miranda* safeguards, it is crucial to note that the record contains only a synopsis of the words actually spoken. While Officer Gleckman's remarks could not have lasted more than five minutes,[7] there is a significant difference between a few sentences lasting only ten or fifteen seconds and several minutes of intense discussion. The record does not permit a reasoned conclusion as to which in fact occurred. The latter possibility would produce a monologue far more directed and extensive than the "Christian burial" speech condemned in *Brewer* v. *Williams*, *supra*. Moreover, the precise words aside, this case presents in classic form the almost insur-

[7] The officers testified that they had traveled between a half mile and a mile on an urban street before the respondent made his admission (App. 45, 52, 61). Officer Gleckman estimated the elapsed time to be three to five mintues (R. 458-459).

mountable problem of imaginatively recreating the tenor of a custodial "conversation" to take into account "the subtle messages that can be communicated through changes in vocal inflection and nonverbal communication . . .." White, *Police Trickery in Inducing Confessions*, 127 U. Pa. L. Rev. 581, 586 (1979).

The petitioner has suggested that a few off-hand observations by police officers, overheard by a suspect in custody, sent a majority of the Supreme Court of Rhode Island careening off the judicial road to the conclusions of "subtle compulsion." The respondent suggests to the contrary that the majority opinion is predicated on a common sense recognition of the difficulties inherent in ascertaining the precise nature of a police-suspect interaction and on an informed distrust of the abysmally incomplete record created in the present case. The Supreme Court of Rhode Island has had a long history of carefully reviewing the factual basis for a trial court's conclusion that a criminal defendant voluntarily incriminated himself. *See, e.g., State* v. *Nagle*, 25 R.I. 105, 54 Atl. 1063 (1903). The court has demanded that the State prove the voluntariness of a confession by clear and convincing evidence before it will be submitted for a jury's consideration. *State* v. *Knott*, 111 R.I. 241, 260, 302 A. 2d 64, 74 (1973) (Kelleher and Paolino, JJ., concurring); *State* v. *Espinosa*, 109 R.I. 221, 228, 283 A. 2d 465, 468 (1971); *compare Lego* v. *Twomey*, 404 U.S. 477 (1972), setting a federal constitutional standard of mere preponderance. On appeal, the Supreme Court of Rhode Island will in every case "independently examine the facts, findings and the record of the lower court to determine whether the trial justice erred in ruling on the motion to suppress." *State* v. *Sundel*, R.I. Slip Opinion p. 5 (June 12, 1979); *accord*, *State* v. *Smith*, ____ R.I. ____, 396 A. 2d 110, 113 (1979); *State* v. *Espinosa*, *supra*, at 229, 283 A. 2d at 469.

There can be no question that the Rhode Island court performed exactly this function in the *Innis* case; indeed, the factual orientation of the dissent makes very clear that the probable impact of Officer Gleckman's remarks was the subject of intense debate among members of the court prior to its decision. A majority ultimately concluded that these remarks were as a matter of psychological fact subtly compelling and that they produced an incriminating agreement to lead the officers to the weapon. *State* v. *Innis*, ____ R.I. ____, 391 A. 2d 1158, 1162, 1163 (R.I. 1978). Having lost this issue in a state court of last resort, the petitioner is now asking this Court to reverse this factual finding on its own reading of the record, to substitute the conclusion that Officer Gleckman's remarks were not "likely to elicit an incriminating response" under the circumstances, and with this new factual basis to conclude that the Supreme Court of Rhode Island erred as a matter of federal law in holding that Thomas Innis was interrogated within the meaning of *Miranda*.

Perhaps in recognition of the inappropriateness of this argument in a case where no federal constitutional rights have been infringed by the state court's fact finding process,[8] the petitioner in addition suggests that the Supreme Court of Rhode Island misapplied federal standards in its reliance on the recent case of *Brewer* v. *Williams*, *supra*. In essence, the State argues that a violation of the Sixth Amendment may occur in the total absence of any overt police pressure to confess (*Mas-*

[8] The petitioner's argument would be more appropriate if this were a case in which a federal right had been denied. In *Niemotko* v. *Maryland*, 340 U.S. 268, 271 (1951), this Court restated its long standing duty in this area.

> In cases in which there is a claim of denial of rights under the Federal Constitution, this Court is not bound by the conclusions of lower courts, but will reexamine the evidentiary basis on which those conclusions are founded.

This obligation rests upon principles this Court enunciated in *Martin* v. *Hunter's Lessee*, 1 Wheat. 304 (1816), when first justifying its invocation of appellate jurisdiction over the state courts. The requirement of evidentiary review stems from the two purposes for which this review was deemed essential: (1) to safeguard the authority of the federal government in the rightful exercise of its powers, and (2) to safeguard the rights individuals might claim under the authority of the federal government. Thus, the tension which must inevitably exist within a federal system composed of sovereign states defined both the necessity of appellate review and the scope of its invocation. Where, as in the present case, the appellate jurisdiction of this Court over state courts is invoked to review a decision in which a claim under federal authority is upheld, these purposes are not implicated. Moreover, the circumstances surrounding the 1914 amendment to the judiciary act (now 28 U.S.C. § 1257) which authorized review in this Court when a claim of federal right is upheld in a state court indicate a concern not for differing applications of federal rights, but for divergent interpretations of the federal right itself. *See* Dodd, *The United States Supreme Court as Final Interpreter of the Federal Constitution*, 6 Ill. L. Rev. 289 (1911). For a retrospective analysis of the *Lochner* controversy, *see* Felix Frankfurter, *The Business of the Supreme Court of the United States — A Study in the Federal Judicial System*, 39 Harv. L. Rev. 1046, 1049-1057 (1926).

This Court has implicitly observed a different standard of review, emanating from the distinct history and purposes of the 1914 amendment, when dealing with state court decisions upholding a right under federal authority but not involving a redefinition of the right itself. Here, the respect rightfully accorded the state judiciary serves to circumscribe this Court's exercise of its powers and review. Far from substituting one factual conclusion for another, when both are reasonably founded in the evidence, this Court has implicitly established a standard of deference which requires the petitioner to show one of two situations in order to justify reversal: (1) if the state court "held as it did because it felt under compulsion of federal law as enunciated by this Court so to hold, it should be relieved of that compulsion," *Missouri ex. rel. Southern R. Co.* v. *Mayfield*, 340 U.S. 1, 5 (1950); *Zacchini* v. *Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977); or (2) if the state court has imposed "greater restrictions as a matter of federal constitutional law when this Court *specifically refrains from imposing them*." *Oregon* v. *Haas*, 420 U.S. 714, 719 (1975) (emphasis supplied); *Fare* v. *Michael C.*, ____ U.S. ____, 25 Cr. L. 3184, 3187 (1979). The petitioner's argument that the Supreme Court of Rhode Island erred in assessing the probable impact of Officer Gleckman's remarks reaches neither of these categories.

siah v. *United States*, 377 U.S. 201 (1964)), and that therefore this Court's discussion of interrogation in *Williams* is irrelevant to the question whether the comments of the Providence police were an inducement to speak above and beyond the compulsion inherent in the arrest. This argument is misplaced for a number of reasons. First, as the Supreme Court of Rhode Island noted in its opinion, Mr. Justice Stewart approved the conclusion reached by the state and lower federal courts that Williams had in effect been interrogated. These decisions were primarily based on *Miranda*, and the majority opinion does not even intimate that they misapplied the case. Second, the issue in *Williams*, unlike *Massiah*, was "whether there had been a voluntary waiver, and this turns in large part upon whether there was interrogation." *Brewer* v. *Williams*, *supra*, at 410 (Powell, J., concurring). Psychological pressure from the police will vitiate a Sixth Amendment waiver. *Id.* at 412 (Powell, J., concurring). Similarly, it will trigger the protections of *Miranda*. In both cases the issue is the same: the presence or absence of subtle coercion.

The opinion of the Supreme Court of Rhode Island carefully denoted the issues before it as Fifth Amendment issues; moreover it explicitly recognized *Williams* to be a Sixth Amendment case. It did not find the facts of *Williams* controlling, as the State suggests, but rather illustrative insofar as both cases presented a problem of psychological coercion. The majority concluded that the respondent had been interrogated, within the meaning of *Miranda*, not because it utilized a Sixth Amendment legal standard in a Fifth Amendment case, but because it found as a matter of psychological fact that Innis had been subjected to "subtle compulsion."

Thomas Innis was exposed to Officer Gleckman's highly emotive comments within minutes of his arrest and his request for the assistance of counsel. The pressures inherent in his situation were far greater than those present in *Brewer* v.

Williams, *supra*. Unlike Williams, he had not actually spoken with counsel; unlike Williams, he had received no indication that he would be permitted to see counsel at any time in the near future; and, unlike Williams, he had not sat with an apparently friendly or at least neutral police officer for an extended period of time without mishap. Instead, immediately after a gunpoint arrest, he was placed in a tightly enclosed space with three police officers.[9] Although bound for the central station, the wagon was apparently traveling directly away from the center of Providence during the crucial few minutes (App. 60).[10] From the respondent's point of view, he was heading off into the darkness without any indication of his ultimate destination. Almost instantly, he was forced to listen to remarks which, as the interrogation manuals instruct,[11] displayed full confidence that the shotgun was in fact near the scene of the arrest and by necessary implication that Innis had placed it there. The officers' conversation conjured up a

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[9] Professor Driver has explicated the psychological impact of close-quarters interrogation.

> [T]o be physically close is to be psychologically close. The situation has a structure emphasizing to the persons involved the immediacy of their contact . . .. When the norm governing spatial distance is violated, a person's instantaneous and automatic response is to back up, again and again. The suspect, unable to escape, will become even more anxious and unsure.

Driver, *Confessions and the Social Psychology of Coercion*, 82 Harv. L. Rev. 42, 44-46 (1968).

[10] Officer Williams was certain that Innis made his admission prior to reaching the intersection where the wagon would turn back into the city (App. 60). The other two officers testified they made the turn back toward the city, but were not asked specifically where they were when the respondent agreed to take them to the shotgun (App. 45, 52).

[11] *See*, Inbau and Reid, *Criminal Interrogation and Confessions* 26 (2d ed. 1967).

highly speculative tragedy, replete with such evocative detail as the sex of the soon-to-be victim (App. 59). The person they would hold responsible was no less obvious for remaining unstated. Officer McKenna did not respond to Gleckman by suggesting that they cordon off the area or that they notify the school officials. He emphasized what was already implicit in his brother officer's comments: they had to find the weapon to avert a child's death (App. 53). In effect, the officers staged a morality play which challenged its audience to display a humanitarian and necessarily incriminating response to a life-threatening situation.

Appeals to the conscience of the suspect form the heart of a number of interrogational techniques. *See, e.g.*, O'Hara, *Fundamentals of Criminal Investigation*, 102-103 (1st ed. 1956), quoted extensively by this Court in *Miranda* v. *Arizona*, *supra*, at 449-453. The subject should be challenged "to display some evidence of decency and honor." Inbau and Reid, *supra*, at 61. Preferably, the interrogating officer should focus on a detail of the offense and avoid expressing interest in the crime as a whole. *Id.* at 79-82. At all times he should convey confidence in the suspect's guilt. *Id.* at 26. Officer Gleckman's remarks fitted these specifications, and they certainly produced an incriminating response.

The petitioner suggests that there is no *Miranda* interrogation where custodial comments are "*neither* intended *nor* likely to compel incriminating responses" from the accused (Petitioner's Brief at 21) (emphasis supplied), and that *Innis* meets both prongs of this test. The respondent believes that it satisfies neither.

The trial record is absolutely silent on the question of subjective intent; the officers did not testify that they never intended to elicit the location of the shotgun from the respondent. The trial court implied, but did not definitively state, that the police were merely expressing their natural concern

for the safety of others (App. 62). The Supreme Court of Rhode Island implied, but did not state, that the officers' comments were a deliberately calculated ploy. *State* v. *Innis*, *supra*, at 1162. In the absence of testimony on this point, the question of intent did not turn on the credibility of the suppression witnesses, an issue for trial court resolution, but on the drawing of inferences from largely undisputed if somewhat sketchy facts. The respondent suggests that the circumstances and tenor of the remarks indicate deliberateness, and that, in any event, given the importance of the rights at stake, the ambiguity must be resolved against the state. *Cf. Addington* v. *Texas*, ___ U.S. ___, 99 S. Ct. 1804 (1979).

The petitioner's two-part test follows the lead of other courts which have held that *Miranda* interrogation encompasses any "police conduct . . . 'expected to, or likely to, evoke admissions.'"[12] *United States* v. *Lewis*, 425 F. Supp. 1166, 1176 (D. Conn. 1977); *accord*, *Santos* v. *Bayley*, 400 F. Supp. 784, 795 (M.D. Pa. 1975); *Commonwealth* v. *Simala*, 434 Pa. 219, 226, 252 A. 2d 575, 578 (1969); *cf. United States* v. *Vasquez*, 476 F. 2d 730 (5th Cir. 1973), *cert. den.* 414 U.S. 836 (1973). A purely subjective standard would create an evidentiary morass on an issue only indirectly related to the ultimate issue of voluntariness. Moreover, it would include within the purview of *Miranda* precisely those situations which the petitioner argues fall within the Sixth Amendment but outside the Fifth. These situations are typified by the *Massiah* case where the subject did not know he was speaking with an agent and

[12] Oregon has concluded that *Miranda* interrogation "is not limited to direct inquisitorial repartee, it includes the various approaches police have available to obtain an incriminating statement." *State* v. *Johnson*, 37 Or. App. 209, 213, 586 P. 2d 811, 814 (1978). The term encompasses "all police action which is designed to elicit statements from a defendant in custody, including acts of inducement or persuasion." *State* v. *Turner*, 32 Or. App. 61, ___, 573 P. 2d 326, 327 (1978).

consequently felt no offical pressure to incriminate himself, but where the police were certainly seeking an admission to illegal activity (Petitioner's Brief at 18-19); *see generally* Kamisar, *supra*, for a full exposition of the argument that *Miranda* applies only where the suspect is subjected to overt inducements to speak.

In concluding that *Miranda's* custody requirement demands an objective test, Justice Friendly has noted that

> a standard hinging on the inner intentions of the police would fail to recognize *Miranda's* concern with the coercive effect of the "atmosphere" from the point of view of the person being questioned.

United States v. *Hall*, 421 F. 2d 540, 544 (2d Cir. 1969), *cert. den.* 397 U.S. 990 (1970).[13] Interrogation as well must turn on the impact of the police conduct on the suspect.

> [S]o long as the police conduct is likely to elicit incriminating statements and thus endanger the privilege, it is police "interrogation" *regardless of its primary purpose or motivation*, and that if it otherwise qualifies as "interrogation", *it does not become else* because the interrogator's main purpose is the saving of a life rather than the procuring of incriminating statements, even though self-incrimination may be foreseen as a windfall.

Kamisar, *supra*, at 9 (emphasis original).

[13] This Court has implied that an objective, reasonable person standard is appropriate for a determination of *Miranda* custody. *See Beckwith* v. *United States*, 425 U.S. 341 (1976); *Oregon* v. *Mathiason*, 429 U.S. 492 (1977); *Orozco* v. *Texas*, 394 U.S. 324 (1969); *Mathis* v. *United States*, 391 U.S. 1 (1968). Most lower courts which have explicitly considered the issue have adopted this test. *See Hunter* v. *State*, 590 P. 2d 888 (Alas. 1979), and cases cited therein.

The respondent suggests that *Williams* would not have been a different case if Captain Leaming had really wanted to see Pamela Powers decently buried.[14] His remarks would still have vitiated any purported waiver, their intent notwithstanding. Officer Gleckman's comments, even if an innocent intent can be assumed from a skeletal record, nevertheless posed a threat to the privilege, and were no less interrogation for the petitioner's speculations about their motivation.

The petitioner concedes that *Miranda* interrogation "need not be in the form of a question . . ." (Petitioner's Brief at 22). *See, e.g., Combs* v. *Wingo*, 465 F. 2d 96 (6th Cir. 1972).[15] *Miranda* itself catalogues a number of psychological ploys, all sufficiently coercive to trigger the opinion's protections, some of which would amount to Fifth Amendment compulsion, and none of which require the use of direct questions. *Miranda* v. *Arizona*, *supra*, at 450-455. Nor do these techniques demand that the suspect be personally addressed.[16] Indeed, several of

[14] It should be noted that this Court's due process voluntariness cases have never distinguished between a coercive action for a non-incriminatory purpose and one intended to produce an incriminating response. *See, e.g., Jackson* v. *Denno*, 378 U.S. 368 (1964) (water withheld from thirsty suspect for medical reasons).

[15] The Supreme Court of Rhode Island under its own Constitution has long recognized that attempts to elicit information from suspects in custody, not involving direct questioning, may pass permissible bounds. *See State* v. *Travis*, 111 R.I. 678, 360 A. 2d 548 (1976) (finding a violation of the privilege under both the State and Federal Constitutions in a jail plant case where the undercover agent asked no direct questions but instead induced an incriminating statement shortly after the suspect had requested to see an attorney); *State* v. *Nagle*, *supra* (finding an admission to be compelled under traditional standards where defendant, being transported to prison, was told that she should tell the truth and that the police knew she had been lying).

[16] *Miranda* quotes the following two monologues taken from Inbau and Reid, *Criminal Interrogation and Confessions*, 40, 111 (1st ed. 1962), as highly successful psychological ploys:

> "Joe, you probably didn't go out looking for this fellow with the purpose of shooting him. My guess is, however, that you expected some-

thing from him and that's why you carried a gun — for your own protection. You knew him for what he was, no good. Then when you met him he probably started using foul, abusive language and he gave some indication that he was about to pull a gun on you, and that's when you had to act to save your own life. That's about it, isn't it, Joe?"

. . . . . .

"Joe, you have a right to remain silent. That's your privilege and I'm the last person in the world who'll try to take it away from you. If that's the way you want to leave this, O.K. But let me ask you this. Suppose you were in my shoes and I were in yours and you called me in to ask me about this and I told you, 'I don't want to answer any of your questions.' You'd think I had something to hide, and you'd probably be right in thinking that. That's exactly what I'll have to think about you, and so will everybody else. So let's sit here and talk this whole thing over."

Miranda v. *Arizona*, *supra*, at 451-452, 454. It is patently obvious that the last sentence of each of these two ploys could be omitted, while the interrogator simply waited for a "volunteered" response. Moreover, they could be rewritten with an additional character in the script to avoid any direct statement to the subject:

Policeman A trying to placate Policeman B in presence of suspect:

"Now Sam, Joe probably didn't go out looking for this fellow with the purpose of shooting him. My guess is, however, that Joe expected something from him and that's why he carried a gun — for his own protection. He knew him for what he was, no good. Then when Joe met him he probably started using foul, abusive language and he gave some indication he was about to pull a gun on him, and that's when Joe had to act to save his own life."

Policeman B refusing to be placated by Policeman A in the presence of a suspect:

"He may have a right to remain silent. That's his privilege and I'm the last person in the world who'll try to take it away from him. If

these ploys, the false lineup and the reverse lineup,[17] require no verbal conduct by the police whatsoever, yet they are surely as coercive, and probably more coercive, than simple questioning. *Id.* at 453.

Prior confession cases have never recognized a principled distinction between questions from an agent of the state and coercive statements made to or in the presence of a suspect. In *Bram* v. *United States*, *supra*, a suspect, informed by the police of a codefendant's confession, made a damaging admission without ever being asked a question. This Court found a violation of the privilege where the information "produce[d] upon his mind the fear that if he remained silent it would be considered an admission of guilt . . .." *Bram* v. *United States*, *supra*, at 562. In *Ashcraft* v. *Tennessee*, 322 U.S. 143 (1944), the defendant admitted his guilt only after his codefendant's confession was given or read to him. In *Rogers* v. *Richmond*, 365 U.S. 534 (1961), a confession was obtained after the police had indicated in the suspect's presence that they were about to take his wife into custody. Not only were no questions asked of the suspect at this juncture, but the coercive statement was at least ostensibly addressed to a third party. Similarly in *Lynumn* v. *Illinois*, 372 U.S. 528 (1963), the police obtained a confession by threatening the suspect with the loss of her children. How many actual questions were asked is unclear.

that's the way you want to leave this, O.K. But Harry, let me ask you this. Suppose I was in his shoes and you called me in to ask me about this and I told you, 'I don't want to answer any of your questions,' you'd think I had something to hide, and you'd probably be right in thinking that. That's exactly what I have to think about him, and so will everybody else."

[17] *Miranda* defines a false lineup as one where the suspect is identified by a previously coached witness and a reverse lineup as one where he is identified as the perpetrator of crimes which he clearly did not commit. *Miranda* v. *Arizona*, *supra*, at 453.

Lynumn would hardly have been a different case if one officer had said to another, "Well, if she won't cooperate, I guess Child Welfare will have to take her kids." It was in light of this long history of pragmatic consideration of custodial pressure that a majority of this Court categorized the "Christian burial" speech of *Brewer* v. *Williams*, *supra*, as a species of interrogation.

These cases, excepting only *Williams*, were all decided under the less stringent standard of due process voluntariness, and all of them held that the police conduct described above, although not in classic question and answer form, contributed to the coercion which produced confessions later found to be involuntary. *Miranda* applied the privilege to custodial settings to impose "more exacting restrictions than [did] the Fourteenth Amendment's voluntariness test." *Miranda* v. *Arizona*, *supra*, at 511 (Harlan, J., with Stewart and White, JJ., dissenting). As Professor Kamisar has noted, "[i]t would be standing *Miranda* on its head to say that because the Court was 'concern[ed] . . . primarily with [the] interrogation atmosphere and the evils it can bring,' it somehow managed to *lift* restrictions against other forms of compulsion, persuasion, trickery, and cajolery." Kamisar, *supra*, at 18 (emphasis original).

Miranda recognized that "there are a thousand forms of compulsion" and that "our police show great ingenuity in the variety employed." Hopkins, *Our Lawless Police*, 194 n.103 (1931). This Court sought to provide countervailing safeguards when police conduct augments the pressure to confess inherent in the arrest. The opinion's use of the terms "interrogation" and "questioning" must be interpreted in light of this purpose, and not by a dictionary definition divorced from the reality of the methods used to extract information from suspects in custody. A restrictive definition of *Miranda* interrogation would invite the police to place in an interrogation

room two officers whose conversation would have the same coercive effect as a single officer's statement to the suspect or a direct question; it would "place a premium on the ingenuity of the police to devise methods of indirect interrogation, rather than to implement the plain mandate of *Miranda* . . .." *Commonwealth* v. *Hamilton*, 445 Pa. 292, 297, 285 A. 2d 172, 175 (1971). This ingenuity in turn will produce endless litigation. As Mr. Justice Jackson observed in a Fourth Amendment context, "officers interpret and apply themselves and will push to the limit" the doctrines of this Court. *Brinegar* v. *United States*, 338 U.S. 160, 182 (1949) (Jackson, J., dissenting).

If such indirect pressure does not come within *Miranda's* ambit, the police need not give a suspect any warnings whatsoever before they seek incriminating information, providing that they watch their grammar and avoid the direct question.[18] When a slip is made, either at the station or on the witness stand, and a policeman admits to using the abhorrent interrogative, this Court will be called upon to distinguish his conduct from the potentially far more coercive conduct of his peers and condemn it. Such a result is insupportable and is possible only if this Court allows the reality of custodial interrogation to submit to a mere form of words. *Cf. Di Santo* v. *Pennsylvania*, 273 U.S. 34, 43 (1927) (Brandeis, J., with Holmes, J., dissenting).

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[18] Professor Kamisar has identified succinctly this corollary to a restrictive reading of *Miranda* interrogation:

> Furthermore, if these tactics may be resorted to after a suspect has asserted his rights, it would seem to follow that they are permissible a fortiori before he has asserted them. To put it another way, if these tactics do not amount to "interrogation" within the meaning of *Miranda*, then why can they not be employed to "talk a suspect into confessing" without ever advising him of his *Miranda* rights?

Kamisar, *supra*, at 20 n.115.

B. *Interrogation of the Respondent Immediately Following his Request for Counsel and in the Absence of a Voluntary Waiver Violated the Holding in Miranda v. Arizona, supra, and the Fifth Amendment to the Constitution of the United States.*

This Court in *Miranda* v. *Arizona, supra,* did not proscribe all custodial interrogation, but rather merely regulated it: this Court specified a constitutional minimum of information which must be given to a criminal suspect, and the Court required that the police afford the suspect an unrestricted opportunity to make use of this information. Thus, a suspect must be informed of his constitutional protections prior to any interrogation, and he must be permitted to exercise them freely throughout his custodial interaction with the police. *Miranda* v. *Arizona, supra,* at 479. To enforce this free exercise of fundamental constitutional rights in an inherently hostile setting, *Miranda* demanded that the state bear the heavy burden of demonstrating a *Johnson* v. *Zerbst*[19] waiver whenever it seeks to introduce admissions elicited by custodial interrogation. *Schneckloth* v. *Bustamonte,* 412 U.S. 218, 240 (1973). In addition, where the suspect invokes the right to counsel,

> the interrogation must cease until an attorney is present. At that time, the individual must have an opportunity to confer with the attorney and to have him present during any subsequent questioning. If the individual cannot obtain an attorney and he indicates that he wants one before speaking to police, they must respect his decision to remain silent.

Miranda v. *Arizona, supra,* at 474.

[19] *Johnson* v. *Zerbst,* 304 U.S. 458 (1938).

These two protections co-exist where the assistance of counsel has been requested, but they focus on different aspects of the police-suspect interaction. The question of waiver ultimately turns on the state of mind of the accused, although the presence or absence of waiver may be inferred from the external facts of the custodial situation. The requirement that all interrogation cease upon a request for counsel, however, is a prophylactic requirement focusing on the conduct of the interrogators, regardless of the voluntariness of any ensuing statement. *Fare* v. *Michael C., supra,* at 3187. Recognizing the evidentiary problems inherent in determining the voluntariness of waivers elicited behind closed doors, this Court set objective guidelines for the police to follow once a suspect asks to see an attorney. In general, the police must "scrupulously honor" the invocation of the right (*Michigan* v. *Mosley,* 423 U.S. 96 (1975)), and at a bare minimum they must immediately cease for some period of time their attempts to gain incriminating information from the suspect.[20]

[20] The respondent has taken the position that the police deliberately elicited an incriminating response from him. *See* part I(A), p. 25, *supra.* It should be noted, however, that even if they simply acted negligently in uttering remarks likely to induce admissions, they nevertheless violated the *Miranda* rule. *Miranda* and *Mosley* did not merely require that the police in subjective good faith accede to a request for counsel but that the request be "scrupulously honored." The purpose of the rule is to protect the unique role of counsel in our adversary system of justice. *Fare* v. *Michael C., supra,* at 3187. This protection would devolve into a one-sided swearing match if a claim of subjective good faith were to be allowed to defeat the operation of the prophylaxis. Moreover, to the degree that the "scrupulous regard" requirement is based on a need to deter future police misconduct through the exclusion of evidence, this rationale is not directed toward Officer Gleckman in particular, but toward all officers who may be tempted to discuss in evocative terms the suspect's case while he is present.

> The justification of the exclusion of evidence obtained by improper methods is to motivate the law enforcement profession as a whole — not the aberrant individual officer — to adopt and enforce regular pro-

Both the petition for writ of certiorari and the brief of amicus curiae in support of petitioner allege that the Supreme Court of Rhode Island relied on a rigid *per se* interpretation of *Miranda* to hold that when a suspect in custody asserts his right to counsel it becomes legally impossible for him to waive this right until he has consulted with counsel (Brief of Amicus Curiae in Support of Petitioner at 5; Petition for Writ of Certiorari at 8). The facts of *Innis*, however, do not present this issue; nor did the Supreme Court of Rhode Island undertake to decide it. On the contrary, in passing on the admissibility of Innis' initial incriminating response in the police wagon, the majority eschewed any reliance whatsoever on *Miranda's* prophylactic protections and concluded, not that the respondent was legally incapable of waiving his right to counsel, but only, on the record created below, that he had not. *State* v. *Innis*, *supra*, at 1163.[21] Once having determined that this first admission was obtained illegally, the court then rejected the State's claim of subsequent waiver and excluded all evidence relating to the seizure of the shotgun. The court premised its decision on two analytically distinct nexuses between the prior illegality and the later incrimination: first, a legal nexus founded on future deterrence and the extreme reluctance "to allow the state to benefit from [its] illegal actions . . .", *State* v. *Innis*, *supra*, at 1164; and, second, a factual nexus focusing

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> cedures that will avoid the future invasion of the citizen's constitutional rights. For that reason, exclusionary rules should embody objective criteria rather than subjective considerations.

Dunaway v. *New York*, ___ U.S. ___, 99 S. Ct. 2248, 2261 (1979) (Stevens, J., concurring).

[21] *See also State* v. *Kachanis*, ___ R.I. ___, 379 A. 2d 915 (1977), where the Supreme Court of Rhode Island relied on a waiver analysis in preference to a *per se* rule to exclude a statement taken after the police had failed to honor a suspect's request for counsel.

on the actual impact of the first admission on the second — "[t]he seizure of the weapon was the product of the improper remarks of Officer Gleckman." *Id.* at 1164.

The former nexus, despite the majority's unnecessary use of "fruit of the poisonous tree" language and its citation to *Wong Sun* v. *United States*, 371 U.S. 471 (1963),[22] entails nothing

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[22] The petitioner has suggested that the tangible nature of the shotgun takes it out of the ambit of the Fifth Amendment and *Miranda*, except insofar as a fruit of the poisonous tree analysis might be applicable. Although tangible evidence possesses inherent trustworthiness and reliability, this distinction is not central to a Fifth Amendment or *Miranda* argument. The privilege prohibits "the use of 'physical or moral compulsion' exerted on the person asserting the privilege." *Fisher* v. *United States*, 425 U.S. 391, 397 (1976) (citations omitted); *see also In re Gault*, 387 U.S. 1 (1967); *cf.* 8 Wigmore, *Evidence*, § 2266 (McNaughton rev. 1961).

Certain evidence, procured by compulsion, while obviously implicating the Fifth Amendment, has been deemed to fall outside this broad prohibition, by virtue of its "non-testimonial" (i.e., uncommunicative or non-assertive) characteristics. *Schmerber* v. *California*, 384 U.S. 757, 761 (1966); *United States* v. *Wade*, 388 U.S. 218 (1967); *Gilbert* v. *California*, 388 U.S. 263 (1967); *cf.* 8 Wigmore, *Evidence*, § 2263 (McNaughton rev. 1961). This distinction permits compelled production of evidence essentially relating to identification of physical characteristics, and maintains the principles of the Fifth Amendment inviolate.

> The Fifth Amendment privilege against compulsory self-incrimination is an "intimate and personal one," which protects "a private inner sanctum of individual feeling and thought and proscribes state intrusion to extract self-condemnation."

United States v. *Nobles*, 422 U.S. 225, 233 (1975), quoting *Couch* v. *United States*, 409 U.S. 322, 327 (1973).

The petitioner has attempted to excise the shotgun from the attendant circumstances of its recovery. The basis for this excision is unclear. This case involves not a series of loosely related events but one continuous incriminating transaction. While the shotgun itself may not be "testimonial," the attendant circumstances, taken as a whole, comprise a communicative act more graphic than mere words could ever be. *See Schmerber* v. *California*,

more than a routine application of the *Miranda* prophylaxis explicated in *Fare* and *Mosley*. The latter nexus raises the question whether the respondent in fact waived his protections, *given* the prior admission in the police wagon and the circumstances which induced it.

The respondent submits that the record amply supports the decision of the Supreme Court of Rhode Island that at no point during the proceedings did he waive his previously invoked right to counsel. In addition, he contends that the conduct of the Providence police blatantly violated the requirement of *Miranda* that all interrogation cease upon a request for counsel and that the Supreme Court of Rhode Island was correct in concluding that a subsequent renewal of his *Miranda* warnings could not as a matter of law cure the violation which had occurred only minutes earlier.

1. The Police Failed Scrupulously to Honor the Respondent's Invocation of his Right to Counsel.

This Court has recently made very clear that a suspect's request for counsel "is *per se* an invocation of his Fifth Amendment rights, requiring that all interrogation cease." *Fare* v. *Michael C.*, *supra*, at 3187. If the police fail to heed a request

supra, at 761 n.5. The respondent was not only compelled to exhibit his knowledge of the presence of the shotgun, but was further compelled to demonstrate his knowledge of the precise location of the item. His actions were tantamount to a compelled admission of both possession and control of the shotgun, and it is this admission, extracted from the mind, the "private inner sanctum" of the respondent which implicates the Fifth Amendment and *Miranda*. *See State* v. *Dennis*, 16 Wash. App. 417, 558 P. 2d 297 (1976); *State* v. *Moreno*, 21 Wash. App. 430, 585 P. 2d 481 (1978); *State* v. *Mason*, 164 N.J. Super. 1, 395 A. 2d 536 (1979). If the respondent's statements had merely provided a lead to the location of the weapon which the police had later exploited, this would be a fruits case. Where, as here, the police induced Innis to exhibit his knowledge of the shotgun and its location, it is a communications case covered by the Fifth Amendment and *Miranda*.

for counsel and interrogation continues, any ensuing statement must be excluded from the direct evidence against the accused, regardless of its voluntariness under traditional Fifth Amendment analysis. *Id.* at 3187; *Miranda* v. *Arizona*, *supra*, at 479; *see also Michigan* v. *Mosley*, *supra*; *Oregon* v. *Hass*, 420 U.S. 714 (1975). This stringent rule is based on the need to protect the crucial function played by counsel in the adversarial system of criminal justice (*Fare* v. *Michael C.*, *supra*, at 3187) and the presumption that any statement taken after a person invokes his constitutional protections "cannot be other than the product of compulsion, subtle or otherwise." *Miranda* v. *Arizona*, *supra*, at 474.

In *Michigan* v. *Mosley*, *supra*, at 102-103, this Court rejected the contention that *Miranda* created "a *per se* proscription of indefinite duration upon any further questioning by any police officer on any subject, once the person in custody has indicated a desire to remain silent." Mr. Justice Stewart noted, by way of contrast, that *Miranda* may place more stringent limitations on the reopening of questioning once counsel has been requested. *Id.* at 104 n.10.[23] *Innis*, however, does not present the question whether the "scrupulous regard" requirement demands total cessation of all efforts to obtain a waiver until an attorney is present, regardless of the time lapse and the circumstances of the renewed attempt. It presents only the issue whether, without first seeking a clear waiver, the police may seek to elicit incriminating responses from a suspect in custody within minutes of his invocation of the right to counsel.

[23] Lower courts have split on the question whether a request for counsel bars any further interrogation until the suspect has had an opportunity to consult with counsel. *See People* v. *Grant*, 45 N.Y. 2d 366, 375 n.1, 380 N.E. 2d 257, 262 n.1, 408 N.Y.S. 2d 429, 434 n.1 (1978) (collecting cases); *see also*, Note, *Fifth Amendment, Confessions, Self-Incrimination — Does a Request for Counsel Prohibit a Subsequent Waiver of Miranda Prior to the Presence of Counsel?*, 23 Wayne, L. Rev. 1321 (1977).

Thomas Innis requested to see an attorney. He was immediately placed in a police wagon where his attending officers wasted no time in inducing an inculpatory statement. Not only did their comments follow hard on the heels of the respondent's request for counsel, but also they were peculiarly adapted to negate the exercise of the right, as they demanded a response which could not wait on the arrival of counsel.[24] This sequence of events is a paradigm of the conduct which the *Miranda* prophylaxis sought to prevent.

> To permit the continuation of custodial interrogation after a momentary cessation would clearly frustrate the purposes of *Miranda* by allowing repeated rounds of questioning to undermine the will of the person being questioned.

Michigan v. *Mosely*, *supra* at 102; *see also*, *e.g.*, *United States* v. *Charlton*, 565 F. 2d 86 (6th Cir. 1977); *United States* v. *Massey*, 550 F. 2d 300 (5th Cir. 1977); *United States ex rel. Williams* v. *Twomey*, 467 F. 2d 1248 (7th Cir. 1972); *Combs* v. *Wingo*, *supra*; *United States* v. *Miller*, 432 F. Supp. 382 (E.D. N.Y. 1977); *United States* v. *Maddox*, 413 F. Supp. 60 (W.D. Okl. 1976); *compare*, *United States* v. *Pheaster*, 544 F. 2d 353 (9th Cir. 1976).

The petitioner implicitly concedes that, if Officer Gleckman's comments were tantamount to interrogation,[25] the respondent's initial admission in the police wagon was obtained in violation of *Miranda* (Petitioner's Brief at 27). Instead, the petitioner focuses on the events following the respondent's return to the scene of his arrest, arguing that the final set of warnings administered by Captain Leyden and the respondent's agreement to lead the police to the shotgun constituted a waiver of his previously invoked right to counsel (Petitioner's Brief at 27-28). This argument mistakes the nature of the *Miranda* prophylaxis at issue and ignores the existence of the prior violation. At the time the respondent requested the assistance of counsel, Captain Leyden acted as he was required to do under law: he ordered that Innis be transported downtown and that he not be coerced or interrogated (App. 46). In direct contravention of these orders, his subordinates immediately proceeded to pressure their prisoner into an inculpatory agreement to lead them to incriminating evidence.

Captain Leyden's subsequent rendition of the warnings required by *Miranda* could not undo what had already been done. At the point when he requested Innis to reconsider his previously invoked right to counsel, Captain Leyden was the immediate beneficiary of an incriminating admission induced

[24] Oregon has held that the police "may simply inquire if [the suspect] has decided to retract his request for counsel but they may not use subtle, coercive means to achieve a change of mind." *State* v. *Johnson*, *supra*, 586 P. 2d at 814.

[25] While the respondent believes that the comments were interrogation as *Miranda* [illegible]ded that term to be construed, the scrupulous regard requirement does [illegible]t depend on the construction of this term and would appear to encompass any deliberate attempt to elicit incriminating information. Professor Kamisar in discussing *Brewer* v. *Williams*, *supra*, noted that:

> Moreover, and more generally, even if the "Christian burial speech" did not amount to "interrogation" within the meaning of *Miranda*, how can it be said that a detective who "deliberately and designedly set[s] out to elicit information from one who has exercised his *Miranda* rights" is "fully respect[ing]" or "scrupulously honor[ing]" those rights.

Kamisar, *supra*, at 73. As the scrupulous regard requirement focuses solely on the behavior of the police, a suspect who requests counsel would appear to be in much the same position as one whose *Massiah* right to counsel has attached, at least insofar as he will be protected from efforts to gain information not involving overt police pressure. *Id.* at 78 n.461; *see also State* v. *Travis*, *supra*.

by conduct in clear violation of *Miranda*, and his actions only formalized what had already been done informally and illegally.

In suggesting that Innis' subsequent incrimination should be admissible even if his previous one was not, the petitioner is in effect requesting that this Court create a silver platter doctrine operable within the confines of a single police force. *Cf. Elkins* v. *United States*, 364 U.S. 206 (1960). If one policeman may insulate from judicial censure the actions of another, there will be little impetus to obey the mandates of this Court in the first instance, particularly when disobeying them may soften up the suspect or, as in this case, actually result in an agreement to self-incriminate, requiring only a subsequent formal waiver to make fully admissible the substance of the incrimination.[26] Moreover, *Miranda's* prophylactic requirement that interrogation must cease upon a request for counsel is based in part on the need to inform "police and prosecutors with specificity as to what they may do in conducting custodial interrogation . . .." *Fare* v. *Michael C.*, *supra*, at 3187. The information ceases to be specific when a waiver test is substituted as the determinant of admissibility. The available evidence indicates that, despite the obligation of the police to give *Miranda* warnings, most suspects in custody do not invoke their rights and instead execute full waivers. Note, *Interrogations in New Haven: The Impact of Miranda*, 76 Yale L. J. 1519 (1967); Griffiths and Ayres, *A Postscript to the Miranda Project: Interrogation of Draft Protesters*, 77 Yale L. J. 300 (1967); Seeburger and Wettick, *Miranda in Pittsburgh — A Statistical Study*, 29 U. Pitt. L. Rev. 1 (1967); Medalie, Zeitz

[26] The clear implication of the petitioner's position is that the police should be allowed to interrogate without warnings, gain an initial admission, formally recite the suspect's rights, obtain a waiver and proceed to a fully admissible confession, limited only by the requirement that the waiver be voluntary in the totality of the circumstances.

and Alexander, *Custodial Police Interrogation in Our Nation's Capital: The Attempt to Implement Miranda*, 66 Mich. L. Rev. 1347 (1968). *Innis* is the relatively rare case where the record contains an unambiguous and undisputed request for counsel. This request must be given credence by the courts if the Fifth Amendment core of *Miranda* is to remain insulated from the evidentiary problems inherent in reconstructing in the courtroom the reality of incommunicado interrogation. Thus, as *Fare* recognized, when the police fail scrupulously to honor a request for counsel, an immediately ensuing incrimination must be suppressed without regard for any argument that the suspect subsequently waived his rights. *Innis* clearly falls within this rule.

2. At No Point did the Respondent Waive his Previously Invoked Right to Counsel and Privilege Against Compelled Self-Incrimination.

Even in situations where a defendant has not requested the presence of counsel, *Miranda* holds that

> [i]f the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel.

Miranda v. *Arizona*, *supra*, at 475. The determination whether the respondent in fact waived the rights delineated in *Miranda* demands an inquiry into the totality of the circumstances surrounding the interrogation. *Fare* v. *Michael C.*, *supra*, at 3189.

The Supreme Court of Rhode Island elected to focus on the more flexible issue of waiver in preference to an exclusive reliance on the *per se* rule explicated in *Fare*. After quoting the standard of waiver enunciated in *Miranda*, the court noted the following undisputed facts relevant to the legal question of waiver: (1) the respondent had asked to see an attorney only minutes before his incriminating statement in the police wagon; (2) the incriminating statement followed directly from the remarks to Officer Gleckman; and (3) there was nothing in the record to suggest an affirmative waiver of rights[27] other than the fact that Innis ultimately agreed to assist the police in locating the incriminating evidence. *Id.* at 1163-1164. These few facts were all that could be gleaned from the record in the present case, and *Miranda* makes clear that they are woefully inadequate to establish a voluntary waiver. *Miranda* v. *Arizona*, *supra*, at 475-476. Moreover, the request for counsel, while triggering the *per se* rule, also operates as an evidentiary fact which strongly militates against any conclusion of later waiver.

> [T]he accused having expressed his own view that he is not competent to deal with the authorities without legal advice, a later decision at the authorities' insistence to make a statement without counsel's presence may properly be viewed with skepticism.

[27] The Supreme Court of Rhode Island made clear that the absence of an affirmative waiver was only one factor, albeit an important one, to be considered in deciding whether the State had borne its heavy burden of proving waiver. The majority opinion did not even imply that an explicit waiver was a precondition to the admissibility of a statement taken from a suspect in custody, *cf. North Carolina* v. *Butler*, ___ U.S. ___, 99 S. Ct. 1755 (1979); it merely applied the long-recognized principle that "[c]ourts will entertain every reasonable presumption against the waiver of a fundamental constitutional right . . .." *State* v. *Innis*, *supra*, at 1163; *accord*, *Brewer* v. *Williams*, *supra*, at 404; *Brookhart* v. *Janis*, 384 U.S. 1, 4 (1966).

Michigan v. *Mosely*, *supra*, at 110 n.2 (White, J., concurring); *see also White* v. *Finkbeiner*, 570 F.2d 194, 200 n.3 (7th Cir. 1978); *United States* v. *Clark*, 499 F. 2d 802, 807 (4th Cir. 1974); *United States* v. *Cavallino*, 498 F. 2d 1200, 1202-1203 (5th Cir. 1974); *United States* v. *Lewis*, 425 F. Supp. 1166, 1178 (D. Conn. 1977).

The petitioner does not suggest that Innis' initial incriminating response to Officer Gleckman followed a valid waiver (Petitioner's Brief at 27). Instead, the petitioner argues that a waiver occurred subsequent to the violation, when Mr. Innis was returned to the scene of his arrest, where he was given another set of warnings and he again agreed to locate the weapon (Petitioner's Brief at 27-28). If in fact the respondent had not been induced to incriminate himself immediately prior to his return, this sequence of events would support a conclusion that the respondent validly waived his constitutional protections. As the Supreme Court of Rhode Island recognized, however, the respondent's later incriminating behavior cannot reasonably be separated from the prior illegality which had elicited an admission only minutes before.[28]

[28] The cases discussing the impact of a prior illegally obtained confession on a subsequent confession bear a surface resemblance to the "fruit of the poisonous tree" cases, but they rest on a fundamentally different analytical predicate. The exclusionary rule of the *Wong Sun* line of cases was developed primarily to deter future occurrences of the initial violation and not to exclude statements which otherwise failed to satisfy legal standards of admissibility. (*See* part II, *infra*, discussing the applicability of a fruits analysis to the present case.) The cases referred to in this section of the brief test the admissibility of subsequent confessions according to traditional waiver standards, taking into account the coercive effect of having previously confessed to the crime and the fact that the conditions which rendered the first statement inadmissible may carry over to the second if they are not adequately separated in time and circumstance. Suppression of the subsequent incrimination may be required, not because the suspect's rights were previously violated, but because he did not voluntarily waive the privilege before confessing the second time.

Over thirty years ago in *United States* v. *Bayer*, 331 U.S. 532 (1947), this Court considered a claim that a confession, presumed to have been taken in violation of the prophylactic rule of *McNabb* v. *United States*, 318 U.S. 332 (1943), and *Anderson* v. *United States*, 318 U.S. 350 (1943), rendered inadmissible a later confession. Although rejecting any *per se* rule that the mere existence of one illegal confession "perpetually disables" the confessor from making a subsequent legal confession, Mr. Justice Jackson, writing for a unanimous Court, stressed the psychological impact on the accused of once having given an incriminating statement.

> [A]fter an accused has once let the cat out of the bag by confessing, no matter what the inducement, he is never thereafter free of the psychological and practical disadvantages of having confessed. He can never get the cat back in the bag. The secret is out for good.

Id. at 540. Similarly, Mr. Justice Harlan, concurring and dissenting in a case decided on Fourteenth Amendment voluntariness grounds, noted that the state has

> the burden of proving not only that the later confession was not itself the product of improper threats or promises or coercive conditions, but also that it was not directly produced by the existence of the earlier confession.

Darwin v. *Connecticut*, 391 U.S. 346, 351 (1968) (Harlan, J., concurring and dissenting); *see also Harrison* v. *United States*, 392 U.S. 219 (1968) (holding testimony given at a prior trial

inadmissible at a retrial because it was induced by the erroneous introduction of an illegal confession).[29]

In a parallel line of cases, this Court has held that, where conditions of compulsion or other illegality render an initial confession inadmissible and then carry over to a second confession, if there is "no break in the stream of events," the latter confession must be excluded for the same reasons that tainted the first. *Darwin* v. *Connecticut*, *supra*; *Clewis* v. *Texas*, 386 U.S. 707 (1967); *Leyra* v. *Denno*, 347 U.S. 556 (1954); *Lyons* v. *Oklahoma*, 322 U.S. 596 (1944). This recognition of the continuing effects of earlier compulsion, despite the intervention of a temporal hiatus and the giving of constitutional warnings, was the explicit basis for decision in *Westover* v. *United States*, 384 U.S. 436, 494 (1966). Westover was extensively interrogated without first being informed of his rights. Later he was turned over to the F.B.I., where he was given *Escobedo* warnings, and he confessed. Noting that a different case would have been presented if the second interrogation had been removed in time and space, this Court concluded that

> the FBI interrogation was conducted immediately following the state interrogation in the same police station — in the same compelling surroundings. Thus, in obtaining a confession from Westover the federal authorities

[29] The majority in *Harrison* used "fruit of the poisonous tree" language to reach its conclusion. Mr. Justice White dissented, largely on the ground that the deterrence rationale of the fruits doctrine was not appropriate in the *Harrison* setting. To the degree, however, that *Harrison* rests on a conclusion that "the petitioner's trial testimony was *in fact* impelled by the prosecution's wrongful use of his illegally obtained confessions" (*id.* at 224 (emphasis supplied)), *Harrison* supports the argument made here that the fact of Innis' initial admission, as well as his continuing custody, provide an ample factual basis for the conclusion that his later incriminating conduct was the direct product of the prior illegality.

were the beneficiaries of the pressure applied by the local in-custody interrogation. *Id.* at 496-497.

The lower federal courts have consistently applied the *Bayer* cat-out-of-the-bag theory and have realistically appraised the continuing effect of prior illegal police behavior to exclude on a case-by-case basis subsequent confessions given after adequate warnings, where the two confessions were closely related in time and circumstances, and the police in effect "entered the fray armed with defendant's earlier admissions." *United States* v. *Pierce*, 397 F. 2d 128, 131 (4th Cir. 1968); *see also, e.g., United States* v. *Nash*, 563 F. 2d 1166 (5th Cir. 1977), *rev'd en banc* on other grounds, *Nash* v. *Estelle*, No. 75-3773, June 21, 1979 (one confession the product of the other where defendant without warnings admits crime, is given warnings, signs waiver and readmits crime); *Randall* v. *Estelle*, 492 F. 2d 118 (5th Cir. 1974) (written confession after warnings and "waiver" not the product of "free and unfettered" choice where defendant four days earlier had confessed after inadequate warnings); *United States* v. *Robinson*, 439 F. 2d 553 (D.C. Cir. 1970) (confession after warnings simply the culmination of prior confessions given without warnings several hours earlier); *Evans* v. *United States*, 375 F. 2d 355 (8th Cir. 1967) (two-day time lapse would not vitiate effect of first confession where same officer present). Where, however, there was a real break in the stream of events and where the mind of the accused was no longer dominated by the prior incrimination, the later confession has been deemed admissible. *See, e.g., Jennings* v. *Casscles*, 568 F. 2d 229 (2d Cir. 1977); *United States* v. *Gorman*, 355 F. 2d 151 (2d Cir. 1965), *cert. den.* 384 U.S. 1024 (1966). The question whether the existence of a prior illegal confession and the circumstances surrounding its taking may render a subsequent confession inadmissible requires the drawing of inferences from the facts as found, and, thus, is primarily an issue for the trier of fact. *Lyons* v. *Oklahoma, supra*, 603. In the present case, the trial justice made no findings of fact on this crucial question (App. 62-63), and the Supreme Court of Rhode Island, in the exercise of its own independent judgment, determined that Innis' later incriminating actions were "the product of the improper remarks of Officer Gleckman." *State* v. *Innis, supra*, at 1164.[30] The record amply supports this conclusion.

Mr. Innis had asked to see an attorney and, instead, while in "an inherently coercive setting" (*Brewer* v. *Williams, supra*, at 413 n.2 (Powell, J., concurring)), he had been made privy to highly emotive statements, amounting to "subtle compulsion" in view of the Supreme Court of Rhode Island. In response to these statements, he made an incriminating agreement to lead the officers to a shotgun. The officers immediately radioed this development to Captain Leyden back at the scene of the arrest (App. 44), and the respondent could hear this radio call (App. 46). Within minutes, he was confronted by Captain Leyden, who was already "armed with defendant's earlier admission." The officers in the wagon repeated that Innis would show them where the shotgun was located (App. 22). One officer originally testified that the first words out of Captain Leyden's mouth were, "You want to show us where it was [*sic*]," and that Innis said yes (App. 24).[31] Others testified that he was immediately rewarned of his rights and that he agreed to lead them to the shotgun because of the children in the area (App. 39).

[30] The Rhode Island court's ordinarily broad scope of review over the voluntariness of confessions is augmented where the trial court fails to exercise its independent judgment on the factual predicate to the legal issues presented by the case. *Cf. State* v. *Card*, 105 R.I. 753, 255 A. 2d 727 (1969); *State* v. *Frageorgia*, 84 R.I. 30, 121 A. 2d 321 (1956).

[31] Immediately subsequent to this answer the officer testified that he did not actually hear the comment (A. 24-25).

At the time of his alleged waiver, Mr. Innis' circumstances had not materially changed: he was back at the scene of his gunpoint arrest, still handcuffed and still surrounded by police officers, including those whom he had already promised he would do what they clearly wished him to do (App. 39). By his prior admission, he was totally committed to an incriminating course of action. Not only was the cat out of the bag, but he had promised to keep it there. There was no "break in the stream of events": one admission led immediately to the next while he remained in the custody of the same police officers (App. 39). Innis' express reason for leading the police to the shotgun, the risk to little children, indicates the continuing impact of the morality play staged in the police wagon. The only intervening event, the *pro forma* administration of a fresh set of warnings, could not cure the previous illegality. Mr. Innis' problem was not lack of information regarding his rights; he had already received three sets of warnings. Rather, it was his clearly expressed inability to deal with the police without legal advice. *Michigan* v. *Mosley*, *supra*, at 110 n.2 (White, J., concurring). New warnings in the same custodial setting could not bestow competence where none existed before. In short, at the time the respondent "voluntarily" waived his previously invoked protections, the available evidence indicates that he could not have reasonably refused to do otherwise.

Given the nature of the prior illegality, the existence of an admission committing the respondent to incriminate himself, and the close factual nexus between events in the wagon and those following the return to the scene of the arrest, the State could not and did not carry its heavy burden of demonstrating a truly voluntary waiver of the respondent's constitutional protections. As in *Brewer* v. *Williams*, *supra*, at 404, the facts of this case demonstrate "comprehension" but not "relinquishment." In these circumstances, the Supreme Court of Rhode

Island was fully justified in concluding that all of the evidence relating to the seizure of the shotgun, regardless of the applicability of any *per se* rule of exclusion, was obtained in violation of *Miranda*.

II. The Supreme Court of Rhode Island was Correct in Concluding that the Shotgun Itself Should have been Suppressed from Evidence.

Miranda v. *Arizona*, 384 U.S. 436, 479 (1966), mandates that "unless and until . . . warnings and waiver are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation can be used against [the defendant]." *See also Fare* v. *Michael C.*, ____ U.S. ____, 25 Cr. L. 3184, 3187 (1979). The respondent has contended in part I of this brief that the events leading to and including the seizure of the shotgun were all part of a single incriminating transaction undertaken after the invocation of the right to counsel and in the absence of a voluntary waiver; the decision of the Supreme Court of Rhode Island should therefore be affirmed as an application of settled principles to a difficult and somewhat obscure record which, under state law, the court had an obligation to evaluate independently. Rejecting the state court's finding of "subtle compulsion" and minimizing the factual nexus between the initial illegality and the immediately ensuing incrimination, the petitioner characterizes this case as involving a purely technical violation of *Miranda* and a *per se* exclusion of peculiarly reliable derivative evidence. On this basis, it argues in part III of its brief that under *Michigan* v. *Tucker*, 417 U.S. 433 (1974), the state court should have applied a flexible exclusionary remedy to the suppression of the

shotgun itself and that on the facts of this case exclusion of the shotgun was erroneous as a matter of federal law.[32] Even assuming that the finding of the shotgun may be disconnected from the incriminating acts and admissions which linked it to the respondent (*see supra* at p. 35 n.22), the respondent suggests that the petitioner has underestimated the nature and extent of the initial illegality, and consequently, through an undifferentiated application of *Michigan* v. *Tucker*, *supra*, has constructed an argument for flexible exclusion inappropriate to the present case.

A. *The Police's Use of Psychological Pressure to Induce Self-Incrimination in an Already Coercive Setting, After a Request for Counsel, Violated the Respondent's Privilege Against Compelled Self-Incrimination.*

The constitutional problem in the present case is not just that the Providence police applied psychological pressure on the respondent to incriminate himself in an already coercive

[32] This Court need not, however, reach this issue. The shotgun by itself was not particularly probative. The crucial evidence was Mr. Innis' admissions and conduct which established his knowledge and previous control of the weapon. If these acts and admissions should have been excluded at trial, the question of the admissibility of the shotgun becomes *de minimis*. As the petitioner has not claimed that the introduction of the police testimony regarding the respondent's incriminating course of conduct was harmless in light of the other evidence against him (*see* Petitioner's Brief at 43), error in admitting this evidence will necessitate a new trial regardless of this Court's disposition of the fruits argument. If these admissions and conduct were properly admitted, the introduction of the shotgun would be harmless error (*see* part III, *infra*). This case is simply not one where the tangible evidence, divorced from the context of its findings, was crucial to either side. *Compare Killough* v. *United States*, 336 F. 2d 929 (D.C. Cir. 1964); *cf. Brewer* v. *Williams*, 430 U.S. 387, 416 n.1 (1977) (Burger, C.J., dissenting); *Keister* v. *Cox*, 307 F. Supp. 1173 (W.D. Va. 1969).

setting; nor is it simply that they did so by means of a ploy which virtually precluded the possibility of a valid waiver. What distinguishes this case from the ordinary *Miranda* case is the undisputed fact that the pressure was exerted immediately after the respondent had requested the assistance of counsel.

The foundation of the *Miranda* decision is the explicit extension of the privilege against compelled self-incrimination to custodial interrogations occurring prior to the beginning of formal judicial proceedings.[33] The majority was fully aware that it was setting a stricter constitutional standard for the admissibility of confessions than had been required by the Fourteenth Amendment; indeed, in reference to the four cases before the court, Mr. Chief Justice Warren admitted that "we might not find the defendants' statements to have been involuntary in traditional terms." *Miranda* v. *Arizona*, *supra*, at 457; *see also Michigan* v. *Tucker*, *supra*, at 443. In order to fulfill the policies of the privilege, the accused must be guaranteed "the right . . . to remain silent unless he chooses to speak in the unfettered exercise of his own will." *Id.* at 460, quoting *Malloy* v. *Hogan*, 378 U.S. 1, 8 (1964). Any incrimination must be "the product of his free and rational choice." *Greenwald* v. *Wisconsin*, 390 U.S. 519, 521 (1968). It may not be obtained "by the exertion of any improper influence." *Malloy*

[33] At the time of its adoption, the privilege was apparently intended to proscribe judicial interrogation of the accused at trial and more particularly during preliminary examination. Kamisar, *A Dissent from the Miranda Dissents: Some Comments on the "New" Fifth Amendment and the Old "Voluntariness" Test*, 65 Mich. L. Rev. 59, 73 (1966). During the eighteenth century, magistrates exercised the investigative function now given over to the police; professional detectives were unknown and the "primitive constabulary . . . attempted little in the way of interrogation of the persons they apprehended." *Id.* at 66, quoting Mayers, *Shall We Amend the Fifth Amendment?* 86 (1959). Once investigations were transferred from the courthouse to the stationhouse, an extension of the Fifth Amendment was necessary if it was to continue to be "as broad as the mischief against which it seeks to guard." *Counselman* v. *Hitchcock*, 142 U.S. 547, 562 (1892).

v. *Hogan*, *supra*, at 7, quoting *Bram* v. *United States*, 168 U.S. 532, 542-543 (1897).

To insure this full freedom of choice in the exercise of the privilege, *Miranda* mandated a system of procedural safeguards deemed to be "fundamental with respect to the Fifth Amendment privilege and not simply a preliminary ritual to existing methods of interrogation." *Miranda* v. *Arizona*, *supra*, at 476. Where these requirements are not followed and the states fail to adopt "other fully effective means . . . to notify the person of his right of silence and to assure that the exercise of the right will be scrupulously honored . . . no evidence obtained as a result of interrogation can be used against him." *Id.* at 479. In *Michigan* v. *Tucker*, *supra*, however, this Court concluded that an inadvertent omission of one of the warnings required by *Miranda* did not, on the facts of that case, deprive the respondent of his privilege against compulsory self-incrimination. Mr. Justice Rehnquist emphasized that the accused had been substantially apprised of his rights, including his right to remain silent and his right to counsel, and that he had explicitly waived his right to consult an attorney. *Id.* at 445-446. Moreover, this Court found "significant to [its] decision" the fact that this interrogation preceded the holding in *Miranda* and complied fully with the requirements implicit in *Escobedo* v. *Illinois*, 378 U.S. 478 (1964). *Id.* at 447. Only by transmuting the factual predicate of the decision in *Innis* can the petitioner argue that the *Tucker* analysis should control its result.

The Supreme Court of Rhode Island concluded that comments of Officer Gleckman amounted to "subtle compulsion," *State* v. *Innis*, *supra*, at 1162, and that "[t]his is not a case where a defendant voluntarily confesses to a crime or admits to incriminating evidence on his own." *Id.* at 1163. The court based this conclusion not merely on the coercive impact of Officer Gleckman's remarks taken by themselves, but on the

temporal relationship of these remarks to the respondent's previously invoked right to counsel.

> The defendant's statement to the police admittedly occurred only after his being subjected to Officer Gleckman's remarks, remarks which were highly improper in light of the fact that defendant had not been given an opportunity to consult with his attorney. *Id.* at 1163.

While it is clear that certain deceptive police practices may render a confession involuntary, *see*, *e.g.*, *Spano* v. *New York*, 360 U.S. 315 (1959); *Leyra* v. *Denno*, 347 U.S. 556 (1954), this Court has never had occasion to define in comprehensive fashion the limits placed on techniques of psychological interrogation by the federal constitution. *Miranda* notes that "any evidence that the accused was threatened, tricked, or cajoled into a waiver will, of course, show that the defendant did not voluntarily waive his privilege," and the decision implies that "patent psychological ploys" constitute compulsion within the meaning of the Fifth Amendment. *Id.* at 476, 457. The petitioner contends that, at the very least, where psychological pressure has the effect of negating or undermining a suspect's exercise of his right to remain silent or his right to counsel, any subsequent self-incrimination was compelled within the meaning of the privilege.[34] *See* White, *Police Trickery in Inducing Confessions*, 127 U. Pa. L. Rev. 58 (1979), for a full explication of this analytical approach.

In *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 240 (1973), this Court noted that the basis of the *Miranda* decision was the

[34] *Oregon* v. *Hass*, 420 U.S. 714 (1975), is not to the contrary. This Court emphasized that there was "no evidence or suggestion that Hass' statements . . . were involuntary or coerced." *Id.* at 722.

need to protect the integrity of the trial itself, quoting the following language from the opinion:

> Without the protections flowing from adequate warnings and the rights of counsel, "all the careful safeguards erected around the giving of testimony, whether by an accused or any other witness, would become empty formalities in a procedure where the most compelling possible evidence of guilt, a confession, would have already been obtained at the unsupervised pleasure of the police."

Miranda v. *Arizona*, *supra*, at 466, quoting from *Mapp* v. *Ohio*, 367 U.S. 643, 685 (1961) (Harlan, J., dissenting). In this regard, *Miranda* built on the recognition in *Escobedo* v. *Illinois*, *supra*, at 487 that a refusal to permit a suspect in custody to consult with counsel could "make the trial no more than an appeal from the interrogation."[35] Unless an arrested person has the right to command the presence of counsel,

> [t]he circumstances surrounding in-custody interrogation can operate very quickly to overbear the will of one merely made aware of his privilege by his interrogators.
>
> . . . . . .
>
> The presence of counsel at the interrogation may serve several significant subsidiary functions as well. If the accused decides to talk to his interrogators, the assistance of counsel can mitigate the dangers of untrustworthiness.

[35] This Court has since noted that the "'prime purpose' of *Escobedo* was not to vindicate the constitutional right to counsel as such, but, like *Miranda*, 'to guarantee full effectuation of the privilege against self-incrimination . . ..'" *Kirby* v. *Illinois*, 406 U.S. 682, 689 (1972), quoting from *Johnson* v. *New Jersey*, 384 U.S. 719, 729 (1966).

> With a lawyer present the likelihood that the police will practice coercion is reduced, and if coercion is nevertheless exercised the lawyer can testify to it in court. The presence of a lawyer can also help to guarantee that the accused gives a fully accurate statement to the police and that the statement is rightly reported by the prosecution at trial.

Miranda v. *Arizona*, *supra*, at 469-470; *accord*, *Fare* v. *Michael C.*, *supra*, at 3187. Thus, the Court concluded that "the right to have counsel present at the interrogation is *indispensable* to the protection of the Fifth Amendment privilege . . .." *Miranda* v. *Arizona*, *supra*, at 469 (emphasis supplied).[36]

In *Michigan* v. *Mosley*, *supra*, Mr. Justice White recognized that a request for counsel by a suspect in custody differed significantly from an invocation of his right to silence. A person who simply states that he does not wish to talk has made his own decision regarding his interaction with the police. *Id.* at 109 n.1. An attempt to induce him to reconsider his position may violate the *per se* rule of *Miranda*, but it may not necessarily be a violation of the privilege unless under all the circumstances the attempt amounts to compulsion. Where, however, the suspect requests the assistance of counsel, he is in effect saying that he is not competent to fend for himself, that he cannot exercise "free and rational choice" in responding to

[36] This recognition of the unique protections afforded by counsel led the Court to establish a *per se* rule of exclusion where the police fail to honor scrupulously a suspect's request to see an attorney. *Fare* v. *Michael C.*, *supra*, at 3187. It also led the Court to demand that the prosecution satisfy the standard of *Johnson* v. *Zerbst*, 304 U.S. 458 (1938), before a waiver of counsel would be countenanced, even where no previous invocation of the right had occurred. *Schneckloth* v. *Bustamonte*, *supra*, at 240; *see also North Carolina* v. *Butler*, ___ U.S. ___, 99 S. Ct. 1755 (1979).

the authorities' attempt to gain a waiver of his Fifth Amendment privilege. *Id.* at 110 n.2.[37]

The Fifth Amendment privilege "stands as a protection of . . . values reflecting the concern of our society for the right of each individual to be let alone." *Tehan* v. *United States ex rel. Shott*, 382 U.S. 406, 416 (1966). It guarantees a "right to a private enclave where [every person] may lead a private life." *Miranda* v. *Arizona*, *supra*, at 460, quoting *United States* v. *Grunewald*, 233 F. 2d 556, 581-582 (2d Cir. 1956) (Frank, J., dissenting), *rev'd*, 353 U.S. 391 (1957). *Miranda* extended this "right to a private enclave" even to the criminal suspect in custody. When such a person requests the assistance of counsel, he is asking for help in maintaining the integrity of this enclave because he alone cannot withstand the pressures of his situation. He is wrapping his privilege in the protections afforded by counsel, and where the police ignore this attempt to avoid self-incrimination by immediately proceeding to elicit through psychological pressure a relinquishment of the previously claimed right, no waiver is possible. Any ensuing incrimination "cannot be other than the product of compulsion, subtle or otherwise." *Miranda* v. *Arizona*, *supra*, at 474.

In the present case, the respondent requested counsel, and within minutes he was induced to forgo the protections he had just invoked. The nature of the inducement was a morality play which requested a response simultaneously humanitarian and incriminatory. Innis was placed in a false dilemma: either

[37] "It is sufficient to note that the reasons to keep the lines of communication between the authorities and the accused open when the accused has chosen to make his own decisions are not present when he indicates instead that he wishes legal advice with respect thereto. The authorities may then communicate with him through an attorney. More to the point, the accused having expressed his own view that he is not competent to deal with the authorities without legal advice, a later decision at the authorities' insistence to make a statement without counsel's presence may properly be viewed with skepticism." *Michigan* v. *Mosley*, *supra*, at 110 n.2 (White, J., concurring).

he divulged the location of the shotgun or someone, probably a little girl, might die, and he alone must decide. The ploy not only demanded a decision prior to consulting with counsel, but also tended to disguise the real issue, whether he would incriminate himself, by seeking on its face not an admission of a crime but assistance in saving a life.

The utility of counsel in these circumstances is clear. An attorney would recognized the incriminating nature of the desired response, and if Innis nevertheless wished to remove the threat of an unattended shotgun, the attorney could have transmitted the information as to its location, under the cloak of the attorney-client privilege. *Brewer* v. *Williams*, *supra*, at 408 (Marshall, J., concurring). Innis, however, almost certainly unaware of this third option, proceeded to incriminate himself.

The remarks of Officer Gleckman were not only subtly compelling, as the Supreme Court of Rhode Island found; they also served to frustrate the exercise of a right "indispensable to the protections of the Fifth Amendment privilege . . .." *Miranda* v. *Arizona*, *supra*, at 469. Such conduct by the police is not a mere technical violation of prophylactic rules, *compare Michigan* v. *Tucker*, *supra*, but a negation of the purpose and policies of the privilege itself.

B. *The Tangible Fruits of a Violation of the Privilege Against Compelled Self-Incrimination Were Properly Suppressed.*

In concluding that the shotgun should have been suppressed from evidence, as well as the respondent's admissions, the Supreme Court of Rhode Island termed the weapon a "fruit of the poisonous tree" and cited *Wong Sun* v. *United States*, 371 U.S. 471 (1963). Based on the exclusionary principles devel-

oped in the cases of *Weeks* v. *United States*, 232 U.S. 383 (1914) and *Silverthorne Lumber Co.* v. *United States*, 251 U.S. 385 (1920),[38] this Court concluded in *Wong Sun* v. *United States*, *supra*, that the policies underlying the exclusionary rule did not invite any logical distinction between physical and verbal evidence seized as a result of an illegal arrest. *Id.* at 486. As certain evidence, both physical and verbal, had "been come at by exploitation of that illegality" and not "by means sufficiently distinguishable to be purged of the primary taint," the Court held that it must be suppressed from evidence.

Later cases from this Court have emphasized that "[t]he exclusionary rule . . . was applied in *Wong Sun primarily* to protect Fourth Amendment rights". *Brown* v. *Illinois*, 422 U.S. 590, 599 (1975) (emphasis original); *accord*, *Dunaway* v. *New York*, ___ U.S. ___, 99 S. Ct. 2248, 2258 (1979). Because the purpose of the rule "is to deter — to compel respect for the [Fourth Amendment] guaranty . . ." (*Brown* v. *Illinois*, *supra*, at 599-600, quoting *Elkins* v. *United States*, 364 U.S. 206, 217 (1960)), even a statement meeting the Fifth Amendment standard of voluntariness may not be "sufficiently an act of free will to purge the primary taint". *Id.* at 602, quoting *Wong Sun* v. *United States*, *supra*, at 486. Unlike the line of cases analyzing the actual impact of an illegally obtained confession upon a subsequent confession (see part I(B)(2), *supra*), the issue whether a fruit was secured by the exploitation of the primary illegality "cannot be decided on the basis of causation in the logical sense alone . . .." *United States* v. *Ceccolini*, ___ U.S. ___, 98 S. Ct. 1054, 1059 (1978). It is fundamentally a legal question, drawing its direction from the deterrent purposes of the exclusionary rule and requiring an examination of a number of factors including "[t]he temporal proximity of the arrest and the confession, the presence of intervening circumstances, . . . and, particularly, the purpose and flagrancy of the official misconduct . . .." *Brown* v. *Illinois*, *supra*, at 603-604 (citations omitted).

[38] In reversing the defendant's contempt citation, the *Silverthorne* Court declared that the essence of the prohibition against illegal search and seizure is "not merely [that the] evidence so acquired shall not be used before the Court but that it shall not be used at all." *Id.* at 392.

While, historically, coerced confessions were suppressed because of their possible unreliability (*see Brown* v. *Mississippi*, 297 U.S. 278 (1936)), an evidentiary problem not usually shared by their fruits, this justification has long since given way to a focus on the threat to the judicial system posed by inquisitorial methods. *See, e.g.*, *Rogers* v. *Richmond*, 365 U.S. 534 (1961); *Spano* v. *New York*, *supra*. The extension of the privilege against compelled self-incrimination to the states and later to the stationhouse was premised solidly on the need to preserve the integrity of the accusatorial process. *Miranda* v. *Arizona*, *supra*, at 460; *Murphy* v. *Waterfront Comm'n*, 378 U.S. 52, 55 (1964); *Malloy* v. *Hogan*, *supra*, at 8 (1964).

Overt application of the *Wong Sun* — *Brown* exclusionary rule to the Fifth Amendment would merely serve to delineate through existing case law the parameters of the privilege already sketched out by this Court's decisions in the immunity area. As long ago as 1892, this Court concluded that a statute could not replace the privilege where it

> could not prevent the obtaining and the use of witnesses and evidence which should be attributable directly to the testimony he might give under compulsion, and on which he might be convicted, when otherwise, and if he had refused to answer, he could not possibly have been convicted.

Counselman v. *Hitchcock*, *supra* at 564. *Murphy* v. *Waterfront Comm'n*, *supra*, held that the Federal Government could

make no use of the compelled testimony *and its fruits* where a witness had testified under a grant of state immunity. *Id.* at 79. Similarly, in *Kastigar* v. *United States*, 406 U.S. 441 (1972), this Court decided that use and derivative use immunity, being co-extensive with the privilege, provided a constitutionally adequate protection for a witness compelled to give self-incriminating testimony.

> Immunity from the use of compelled testimony, as well as evidence derived directly and indirectly therefrom, affords this protection. It prohibits the prosecutorial authorities from using the compelled testimony in *any* respect, and it therefore insures that the testimony cannot lead to the infliction of criminal penalties on the witness. *Id.* at 453 (emphasis original).

These cases suggest that "a branch [of the fruits doctrine] was always present as an essential element of the Fifth Amendment guarantee." *People* v. *Robinson*, 48 Mich. App. 253, 259-260, 210 N.W. 2d 372, 376 (1973) (notes omitted); *see generally* Note, *Scope of Taint Under the Exclusionary Rule of the Fifth Amendment Privilege Against Self-Incrimination*, 114 U. Pa. L. Rev. 570 (1966).

Already in *Harrison* v. *United States*, 392 U.S. 219 (1968), this Court has invoked the metaphor of the fruit of the poisonous tree to exclude from evidence testimony given at a prior trial to counter the effect of illegally introduced confessions. The rationale for the decision was the imperative of judicial integrity. *Id.* at 224 n.10. More recently, in *Michigan* v. *Tucker*, *supra*, this Court has noted that the deterrance rationale of the Fourth Amendment fruits cases "would seem applicable to the Fifth Amendment context as well." *Id.* at 447. Since *Tucker*, a number of state and lower federal courts have

utilized the fruit of the poisonous tree doctrine to exclude derivative evidence resulting from violations of the privilege. *See, e.g., United States ex rel. Hudson* v. *Cannon*, 529 F. 2d 890 (7th Cir. 1976); *United States* v. *Massey*, 437 F. Supp. 843 (M.D. Fla. 1977); *United States ex rel. Lewis* v. *Henderson*, 421 F. Supp. 674 (S.D. N.Y. 1976); *In re Appeal No. 245*, 29 Md. App. 131, 349 A. 2d 434 (1975). These cases, incorporating both a deterrence rationale and the pure Fifth Amendment exclusionary principles of immunity law, recognize the need to exclude the fruits of a violation of the privilege if the integrity of the guaranty is to be preserved.

Applying a fruits analysis to the present case, it is obvious that the seizure of the shotgun was in very close temporal proximity to the previously compelled admissions. Moreover, the shotgun was the focus of the police pressure from the very beginning. No intervening event, other than a rendition of the *Miranda* warnings, occurred to purge the primary taint, and the initial violation was at worst a flagrant and at best a negligent disregard of the respondent's attempt to exercise his constitutional protections. *Cf. Brown* v. *Illinois*, *supra*, at 603-604. In these circumstances, the shotgun was obtained by the exploitation of a constitutional violation and must be suppressed.

C. *Even If it is Concluded that the Respondent's Privilege Against Self-Incrimination was Not Violated, the Fruits of the Miranda Violation which Occurred in the Present Case Should be Excluded from Evidence.*

Michigan v. *Tucker*, *supra*, expressly refused to decide "the broad question of whether evidence derived from statements taken in violation of the *Miranda* rules must be excluded regardless of when the interrogation took place . . .." *Id.* at 447. Instead, this Court based its holding on a far narrower ground: neither *Miranda* nor judicial policy required the ex-

clusion of third party testimonial evidence resulting from a statement given prior to the date of the *Miranda* decision in the absence of one of the required warnings, at least where there was no hint of coercion in the record, where the police had acted in complete good faith, and where the accused had been informed of his right to remain silent and his right to counsel.

Nor does the present case require resolution of the broad question reserved in *Tucker*. The respondent asserts only that where the police deliberately or at least negligently frustrated his explicit exercise of the right to counsel with the specific objective of locating a piece of tangible evidence, this fruit of the violation of his "second-stage" *Miranda* protections should be excluded from evidence. Initially, it should be noted that, while tangible evidence tends to be inherently trustworthy, the exclusionary rules of *Miranda* and of the Fifth Amendment, even as applied to the statements of the accused, are not primarily directed toward the exclusion of unreliable evidence. *Miranda* v. *Arizona*, *supra*, at 480-481; *Murphy* v. *Waterfront Comm'n*, *supra*, at 55; *Tehan* v. *United States ex rel. Shott*, *supra*, at 415-416. Moreover, to the degree that the Fifth Amendment does serve this purpose, *Miranda* "provided new safeguards against the possible use at trial of unreliable statements of the accused . . .." *Michigan* v. *Tucker*, *supra*, at 455. (Brennan, J., concurring.) This function is particularly true of the "second-stage" protections of *Miranda* designed to insure the suspect's ability to cut off *ex parte* interrogation before the custodial pressures had built to such a degree as to make a false confession a real possibility. Thus, to the degree that this Court validates an infringement of these rules, it will be opening the door to precisely the pressures most likely to result in unreliable self-incrimination.[39]

[39] Once the police are told they may disregard a request for counsel in search of tangible fruits, they will do so. *See Brinegar* v. *United States*, 338 U.S. 160, 182 (1949) (Jackson, J., dissenting). Where no adequately incriminating fruits result from their continued interrogation of the suspect but a statement is obtained, the temptation will be present to modify suppression hearing testimony to get the statement into evidence.

The Fourth Amendment fruits doctrine has recently been placed squarely on a deterrence rationale which incorporates earlier notions of judicial integrity. *Brown* v. *Illinois*, *supra*, at 599. Regardless of whether this rationale should be applicable to all *Miranda* violations occurring after the date of the *Miranda* decision (*see generally* Note, *Miranda Without Warning: Derivative Evidence as Forbidden Fruit*, 41 Brooklyn L. Rev. 325 (1974)), it is peculiarly appropriate here. *Innis* is not a case where the police acted in "complete good faith." *Compare Michigan* v. *Tucker*, *supra*, at 447. Officer Gleckman not only disregarded the respondent's invocation of his right to counsel, but he disobeyed the orders of his superior officer, who did follow the *Miranda* mandate. The shotgun was not an unanticipated but legally tainted fruit of a general admission, but rather it was the precise objective of an interrogation undertaken in violation of *Miranda*. Unlike a witness whose identity was discovered by illegal means, the shotgun could not have come forward by itself. *Cf. United States* v. *Ceccolini*, *supra*; *Smith* v. *United States*, 324 F. 2d 879 (D.C. Cir. 1963) (Burger, J., dissenting). Innis had to bring it forward and in the process incriminate himself.

If the police are permitted to ignore a request for counsel whenever they are seeking tangible as opposed to verbal evidence, the deterrent effect of the *Miranda* prophylaxis will disappear. In those relatively few cases where a suspect unambiguously invokes his constitutional protections, the police will have nothing to lose from continued interrogation. Presumably, the suspect will not later confess if they do scrupulously regard his request for counsel, so the police will have a strong incentive to forgo the remote possibility of an admissible oral

statement to seek tangible evidence which will be admitted at trial regardless of their overbearing conduct.

Since *Tucker*, courts have split over the applicability of the fruits doctrine to violations of *Miranda*. *Compare Government of the Virgin Islands* v. *Gereau*, 502 F. 2d 914, 927 (3d Cir. 1974), *cert. den.* 420 U.S. 909 (1975); *Commonwealth* v. *White*, ___ Mass. ___, 371 N.E. 2d 777 (1977), *aff'd* by a divided Court, 99 S. Ct. 712 (1978); *State* v. *Wheeler*, 92 N.M. 116, 583 P. 2d 480 (1978); *Commonwealth* v. *Wideman*, 479 Pa. 102, 385 A. 2d 1334 (1978); *with Simmons* v. *Clemente*, 552 F. 2d 65 (2d Cir. 1977); *United States ex rel. Hudson*, *supra*; *United States* v. *Massey*, *supra*. None of these cases, however, has involved a fact pattern approximating the one presented here.

If law enforcement authorities are to be required scrupulously to honor a suspect's exercise of his rights, the courts must remove the incentive to disregard a request for counsel. *See Michigan* v. *Tucker*, *supra*, at 446. Admissible tangible evidence is an incentive no less strong than an oral statement where from the first it was the objective of the illegal interrogation. The Supreme Court of Rhode Island was correct in excluding the shotgun from evidence as a direct fruit of an interrogation proscribed by *Miranda*.

III. Even If the Supreme Court of Rhode Island Erred in Concluding that the Shotgun Itself Should have been Suppressed, Admission of the Shotgun Alone Would Not Render Harmless the Admission of Police Testimony Regarding the Respondent's Incriminating Statements and Conduct.

In part III of its brief, the petitioner raises the issue of harmless error (Petitioner's Brief at 43-44). The petitioner

does not argue that the introduction of testimony regarding the respondent's incriminating agreements and conduct in leading police to the shotgun should be deemed harmless in light of other evidence presented by the state. Instead, petitioner argues that if the second admission and the shotgun, or alternatively only the shotgun, were properly admitted, then the introduction of any other testimony regarding the incriminating agreements and subsequent conduct was harmless beyond a reasonable doubt. This argument was not made by the petitioner before the Supreme Court of Rhode Island,[40] and this Court should "decline to reach [it] as an initial matter." *Sandstrom* v. *Montana*, ___ U.S. ___, 25 Cr. L. 3159, 3164 (1979). Moreover, no harmless error argument was raised in the petition for writ of certiorari. Supreme Court Rule 23(1)(c) states that "[o]nly the questions set forth in the petition or fairly comprised therein will be considered by the court." This rule has been carefully applied to prevent "the practice of smuggling additional questions into a case after [the court] grant[s] certiorari." *Irvine* v. *California*, 347 U.S. 128, 129 (1954); *see also F.D. Rich Co., Inc.* v. *United States ex rel. Industrial Lumber Co., Inc.*, 417 U.S. 116 (1974); *Strunk* v. *United States*, 412 U.S. 434 (1973).

The crucial evidence against the respondent was not the shotgun itself, removed from the incriminating circumstances of its recovery; it was the testimony relating to the respondent's several agreements to lead the police to the weapon and his conduct in actually locating the item (A. 70, 71-73). If this Court rules that the evidence of the respondent's second admission and of his subsequent conduct was properly admitted

[40] The Supreme Court of Rhode Island did conclude, *sua sponte*, that the total evidence relating to the finding of the shotgun was not harmless beyond a reasonable doubt. *State* v. *Innis*, *supra*, at 1164. Subsequently, the State, on petition for reargument out of time, raised for the first time the narrower harmless error argument made here. The Supreme Court of Rhode Island denied the petition for reargument out of time on procedural grounds and thus never reached the issue on its merits.

by the trial court, then any error in admitting the initial admission or the shotgun would be harmless. If, however, evidence was improperly admitted but the shotgun, divorced from its incriminating background, could nevertheless come in, the error in admitting the police testimony could not possibly be harmless. As the shotgun, by itself, was relatively non-probative,[41] the respondent's conviction would still have to be reversed.

This case is not one in which tangible evidence, if abstracted from the circumstances of its seizure, was of particular importance to either side. In the absence of any claim that the introduction of the entire incriminating transaction was harmless error, the petitioner's attempt to divide this course of conduct into independently viable parts should be rejected.

Conclusion.

At its core, this case presents the issue whether, at the moment a suspect in custody requests legal counsel, that request shields his privilege against self-incrimination or merely acts as a signal to the police to forgo direct confrontation and embark on a stealthy encroachment on the Fifth Amendment guaranty.

The respondent asks this Court not to reduce the request for counsel, usually uttered as a last hope under hostile circumstances, to futile words by approving any attempt of the police to extract incriminating information just so long as they avoid the use of the direct question. Both the prosecution and the

[41] In the case at bar, the tangible evidence, the shotgun, is alleged to be the instrumentality of the crime. Its significance therefore is by virtue of the testimony connecting it with the respondent. This case differs from those cases in which tangible evidence, divorced from the incriminating circumstances of its seizure, has independent probative significance. *Cf. Brewer* v. *Williams*, 430 U.S. 387, 416 n.1 (1977) (Burger, C.J., dissenting); *Killough* v. *United States*, 336 F. 2d 929 (D.C. Cir. 1964).

courts require a clear statement from this Court as to what the police may and may not do when a suspect requests counsel. This Court should hold that, once the request is made, the police may not, in the presence of the accused, engage in conversation likely to induce an incriminatory response.

If Thomas Innis had been in the more fortuitous situation of Williams, who had already spoken with counsel and received the support which the respondent sought at the time of his arrest, the police actions here would be found illegal. To reach a contrary result in this case would ignore the reverberations of the "equal protection argument, a ground bass that resounds throughout the *Miranda* opinion."[42]

For the reasons stated above, the respondent respectfully requests that the judgment of the Supreme Court of Rhode Island be affirmed.

Respectfully submitted,

WILLIAM F. REILLY,
Public Defender,
JOHN A. MacFADYEN, III,
Assistant Public Defender,
Appellate Division,
Office of the Public Defender,
250 Benefit Street,
Providence, Rhode Island 02903.

[42] Friendly, *The Fifth Amendment Tomorrow: The Case for Constitutional Change*, 37 U. Cinn. L. Rev. 671, 711 (1968).